Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

MELANIE STARKMAN,

Petitioner,

v.

THE REV. T. NICHOLS EVANS, a.k.a. NICK EVANS, Individually And In His Official Capacity, Etc. and MANHOLLAND UNITED METHODIST CHURCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Amendment's so-called "ministerial exception" to the important Americans With Disabilities Act should be expanded by the Court of Appeal for the Fifth Circuit in this case to protect illegal discriminatory conduct towards the disabled and to bar a valid Americans With Disabilities Act complaint filed by Ms. Starkman, a disabled American veteran and purely secular Louisiana church employee whom all parties admit is not a clergy person or minister, when other Circuit Courts are contracting, and not expanding, the so-called "ministerial exception" to fundamental civil rights laws, reading this jurisprudentially created exception to the civil rights laws more narrowly, and not, like the Court of Appeal for the Fifth Circuit here, more broadly.

II. Where a valid public policy rationale behind the "ministerial exception", which protects a church's right to choose its own ministers, is completely absent, as in this case, should the First Amendment's so-called "ministerial exception" to the important Americans With Disabilities Act still mechanically be expanded here by the Court of Appeal for the Fifth Circuit to protect illegal discriminatory conduct towards the disabled and to completely bar a valid Americans With Disabilities Act complaint filed by Ms. Starkman, a disabled American veteran and purely secular Louisiana church employee whom all parties admit is not a clergy person or minister, for no valid reason, where other Circuit Courts recognize that a compelling public policy rationale should always be present in order to deprive a citizen of important and fundamental civil rights protections, necessarily including important American With Disabilities Act protections?

III. Whether the granting of a summary judgment to bar a valid Americans With Disabilities Act claim is particularly inappropriate, where all parties admit that Ms. Starkman was a secular (non-ecclesiastical) employee, was never a minister in any church, never sought to be a minister, and where the undisputed deposition testimony, the countervailing affidavits, and the factual exhibits all clearly show the purely secular nature of her employment, especially in view of the overwhelming weight of all of the contradictory evidence submitted by her on this point in timely opposition to the defendant's motion for summary judgment, thus at minimum warranting a fair trial on the merits to determine whether Ms. Starkman's fundamental rights under the Americans With Disabilities Act should be summarily removed, in an unwarranted deference to the so-called "ministerial exception" to the Americans With Disabilities Act?

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STATEMENT OF THE BASIS FOR JURISDICTION

The Fifth Circuit of Appeals entered its judgment on December 27, 1999. A petition for rehearing was denied on February 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution; 42 U.S.C. § 12101, *et seq.* (The Americans With Disabilities Act); 42 U.S.C. § 12112(a) & 42 U.S.C. § 12112(b), (general rules prohibiting discrimination in employment and mandating reasonable accommodation); 42 U.S.C. § 12111(8), (9) (definitions of "qualified individual with disability" and "reasonable accommodation"); 42 U.S.C. § 2000(e) (equal employment opportunities); 29 C.F.R. 1630.16(A), (ADA applies to churches).

STATEMENT OF THE CASE

Plaintiff, Ms. Melanie K. Starkman, a disabled American veteran, was dismissed from her employment as a music director from the defendant Louisiana church employer by the defendant minister Evans, in direct contravention of the Americans With Disabilities Act, 42 U.S.C. § 12117, which fully applies to churches, through a pattern of egregious behavior which included verbal and emotional abuse, actual physical violence, refusal to reasonably accommodate, and ultimately wrongful

termination. Ms. Starkman filed suit under the ADA, and submitted voluminous evidence of those ADA violations by the church, and by the defendant minister Evans, in particular. However, instead of adjudicating and vindicating Ms. Starkman's ADA claims, the lower court instead merely erroneously dismissed Ms. Starkman's claims on the sole summary judgment ground that the First Amendment's "ministerial exception" constituted a complete bar to the ADA suit against the church and minister Evans in her case, even though all parties acknowledged that Ms. Starkman had herself never been a clergy person or minister, had never sought to be a minister, and that she had held a completely secular (non-ecclesiastical) position of employment there. Ms. Starkman is not seeking reinstatement from the defendants in this proceeding.

In a decision released on December 27, 1999, a panel of the Court of Appeal for the Fifth Circuit voted to affirm a grant of summary judgment in this case, dismissing this Americans With Disabilities Act claim of the disabled plaintiff, with no trial, and with no witnesses ever having been sworn, on the ground that the plaintiff, a non-minister music director, could not be covered under the ADA, in effect expanding the applicability of the "ministerial exception" to the civil rights laws to bar a secular music director from asserting an otherwise valid ADA claim. There was no awareness or analysis on the part of the panel as to just what particular public policy was being served thereby. Thus the disabled plaintiff, who the affidavits and facts show was cruelly victimized on account of her physical condition, was, under the panel opinion, left with no federal remedy, and her victimizers were protected, instead of her as the ADA contemplates. Rehearing and rehearing en banc was denied by the Court of Appeal for the Fifth Circuit on February 14, 2000. As recognized in the virtually simultaneous case of *Bollard v. The California Province of the Society of*

Jesus, etc., 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866, (construing the so-called "ministerial exception" narrowly and refusing to apply it to an actual minister where no valid public policies were threatened under the facts of the case), the dissent recognized that these issues raised herein are issues of "exceptional importance". *Bollard, Id.*

This is indeed a rare case of exceptional importance, as the trial and panel opinion effectively deprive Ms. Starkman of her fundamental civil rights under the important Americans With Disabilities Act, on the sole ground of the First Amendment's so called "ministerial exception" to the civil rights laws, with no valid constitutional public policy justification presented by this case whatsoever, since Ms. Starkman was not a minister, and does not seek reinstatement of her employment at the church. Why should violators of the ADA be protected by this Court, and be allowed to discriminate against and abuse the disabled with impunity, when there is no legitimate public policy protecting churches being threatened? Why should an *actual* civil rights violation be allowed to go unremedied, on the grounds of protecting against an *imaginary* Religion Clauses violation? The right of a church to choose its own ministers is not threatened by this important ADA proceeding, which should clearly take precedence. The proper contours of this "exception" to fundamental civil rights laws demand clarification by the Supreme Court of the United States, where millions of secular church workers are affected and where the Circuit Courts are clearly moving in opposite directions on the issue.

The necessity for a compelling constitutional reason to permit an exception to the civil rights laws on the grounds of the so called "ministerial exception", was recently recognized

by *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866, handed down after oral argument in this case, which refused to apply the ministerial exception to an actual minister in a sexual harassment case. Otherwise, the Court would be blindly choosing to fail to remedy an actual constitutional violation, supposedly in order to protect the imaginary, non-existent constitutional violation.

In the dissenting opinion to the order denying rehearing and rehearing en banc in *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767,196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866, the dissent recognized that these issues raised herein are issues of "exceptional importance". *Bollard, Id,* thus warranting Supreme Court review.

STATEMENT OF THE ISSUES

NO VALID PUBLIC POLICY JUSTIFICATION WARRANTS DISMISSAL FURTHERMORE, THE FACTS OF THIS CASE ARE CLEARLY DISPUTED

This is a case of exceptional importance, as the trial and panel opinion effectively deprive Ms. Starkman of her civil rights under the important Americans With Disabilities Act, on the sole ground of the First Amendment's so called "ministerial exception" to the civil rights laws, with no valid constitutional protection justification whatsoever, since Ms. Starkman was not a minister, never wanted to become a minister, and does not seek reinstatement of her employment at the church.

Accordingly, the right of a church to choose its own ministers is not threatened by this important ADA proceeding, which should clearly take precedence. The necessity for a compelling public policy reason to permit an exception to the civil rights laws on the grounds of the so called "ministerial exception", was recognized by *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767,196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866, refusing to apply the "ministerial exception" to an actual minister in a sexual harassment case. That Court recognized that to rule otherwise would be blindly choosing to fail to remedy an actual constitutional violation, supposedly in order to protect an imaginary and non-existent constitutional violation. Therefore, in an effort to avoid injustice, this petition for certiorari is being filed to point out several important errors in the Fifth Circuit's recent decision, and to highlight the new Ninth Circuit jurisprudence favorable to plaintiff. Furthermore, as plaintiff is not a minister, it is respectfully submitted that this factual dispute concerning the secular nature of plaintiff's employment is particularly inappropriate for summary judgment, and warrants a fair trial, where, as here, tremendous amounts of controverting materials were timely submitted by plaintiff in opposition to the defense motion for summary judgment. These controverting materials successfully placed in dispute all controlling factors of the defendant's legal position.

THE BOLLARD CASE

In *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866, the Court recognized that a concrete constitutional

consideration must be present to justify an exception to fundamental civil rights. In *Bollard*, the court allowed the sexual harassment suit of an actual minister (not a lay person) to proceed, since there was no constitutional reason to protect sexual harassment, and the constitutional right of the church to choose its own ministers was not called into question, as the minister had left the order. The court stated:

> Because the plain language of Title VII purports to reach a church's [*947] employment decisions regarding its ministers, courts have had to carve a ministerial exception out of Title VII in order to reconcile the statute with the Constitution. But the scope of the ministerial exception to Title VII is limited to what is necessary to comply with the First Amendment. For example, it does not apply to lay employees of a religious institution if they are not serving the function of ministers. See Fremont Christian Sch., 781 F.2d 1362; Pacific Press, 676 F.2d 1272. In the case of lay employees, the particularly strong religious interests surrounding a church's choice of its representative are missing, and we have concluded that applying Title VII is constitutionally permissible.
>
> In this case, as in the case of lay employees, the Free Exercise rationales supporting an exception to Title VII are missing. The Jesuits do not offer a religious justification [**13] for the harassment Bollard alleges; indeed, they condemn it as inconsistent with their values and beliefs. There is thus no danger that, by allowing this suit to proceed, we will thrust the secular courts into the constitutionally untenable position of passing

judgment on questions of religious faith or doctrine. The Jesuits' disavowal of the harassment also reassures us that application of Title VII in this context will have no significant impact on their religious beliefs or doctrines. See Fremont Christian Sch., 781 F.2d at 1368; Pacific Press, 676 F.2d at 1279.

Moreover, this is not a case about the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry. Bollard does not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action. Cf. McClure, 460 F.2d at 559 ("Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty [**14] he is to perform in the furtherance of the religious mission of the church."). On the contrary, according to the allegations in Bollard's complaint, the Jesuit order has enthusiastically encouraged Bollard's pursuit of the priesthood. It is true that Bollard alleges constructive discharge, but unlike actual discharge, constructive discharge does not refer to a decision by the Jesuits to terminate Bollard's employment. Instead, constructive discharge in the context of Bollard's Title VII sexual harassment claim functions only to signal his estimation of the severity of the harassment and to lay the foundation for including lost wages in a calculation of damages.

The only relevant decision that we can reasonably attribute to the Jesuits on the facts alleged here is the decision not to intervene to stop or curtail the sexual harassment Bollard reported. See Black v. Snyder, 471 N.W.2d 715, 723 (Minn. Ct. App. 1991) (Randall, J., dissenting). But, in our view, it strays too far from the rationale of the Free Exercise Clause to extend constitutional protection to this sort of disciplinary inaction simply because a minister is the target as well as the agent of the harassing [**15] activity. That Bollard has sued under an employment discrimination statute does not mean that the aspect of the church-minister employment relationship that warrants heightened constitutional protection — a church's freedom to choose its representatives — is present. The Free Exercise Clause rationale for protecting a church's personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant. *That rationale does not apply here, for the Jesuits most certainly do not claim that allowing harassment to continue unrectified is a method of choosing their clergy. Because there is no protected-choice rationale at issue, we intrude no further on church autonomy in allowing this case to proceed than we do,* for example, in allowing parishioners' civil suits against a church for the negligent supervision [*948] of ministers who have subjected them to inappropriate sexual behavior. See Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 179 F.R.D. 77, 10 F. Supp. 2d 138 (D. Conn. 1998); Nutt v. Norwich Roman Catholic Diocese, 921 F. Supp. 66 (D. Conn. 1995); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993). [**16]

> *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767,196 F.3d 940, 946-949 (9th Cir. December 1, 1999) *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5, 2000), 2000 U.S. App. LEXIS 8866,. (Emphasis added).

On May 5, 2000, the dissent on the denial of rehearing recognized the "exceptional importance" of these issues. The identical considerations are present here, except here we have a lay non-minister who has clearly made out a *prima facie* case of victimization because of her disability — a clear violation of the important Americans with Disabilities Act, an Act worthy of judicial enforcement, with a complete and total absence of any conceivable rationale to preclude enforcement in this case. There is no legitimate constitutional policy being served, the plaintiff does not seek reinstatement, and the illegal victimization of, and discrimination against, the disabled — even by members of the clergy — is not conduct worthy of judicial protection. For these reasons, the Fifth Circuit decision must be reversed.

A SUMMARY OF THE FACTUAL DISPUTE

In response to plaintiff's petition under the ADA for various ADA violations, including reasonable accommodation and employment discrimination, the defendants moved for summary judgment on the ground of the implied "ministerial exception" to the ADA. Plaintiff, a non-minister, submitted an enormous amount of countervailing evidence regarding the secular nature of her employment, including several affidavits, deposition excerpts, and other documentary evidence, at great expense. Despite the clear existence of a factual dispute, the motion was granted by the trial court and upheld on appeal. The panel opinion acknowledged a certain weakness in the facts supporting the summary judgment, but failed to reverse. The panel opinion acknowledges on page five (5) of the panel ruling that defendants must show — as a completely undisputed fact — that the plaintiff's "primary functions serve [the church's] spiritual and pastoral mission". The panel opinion acknowledges on page six (6) of the ruling that defendants must show — as a completely undisputed fact — that " the plaintiff was qualified and authorized to perform the ceremonies of the Church." On page seven (7) of the recent decision, the panel opinion acknowledges that the defendants must show — as a completely undisputed fact — that the plaintiff "engaged in activities traditionally considered ecclesiastical or religious," including whether the plaintiff "attends to the religious needs of the faithful." The defendants did not show any of these factors to be undisputed in this case. Plaintiff successfully controverted all of these factors — through sworn deposition testimony, church documents, and sworn affidavits, all discussed below. Plaintiff is clearly entitled to a fair trial under the law governing summary judgment. *See* Rule 56, which does not contemplate the conducting of a "mini-trial". At the absolute minimum, a bona fide factual dispute exists here, amply sufficient to defeat

summary judgment in this case. That there is a material issue of fact on this point in dispute is starkly clear. The granting of an erroneous summary judgment in the wrong direction in this case merely exemplifies a disturbing, all too common and increasingly frequent tendency of federal trial courts to "get rid of" cases without any trial at all, much less a fair trial; a tendency which desperately needs correcting by this Court, and which if left unchecked, will predictably result in a drastic decline in parties choosing a federal, instead of a state, forum, in the search for a fair and just adjudication of their claims, and a "just, speedy, and inexpensive" vindication of their rights, as promised by F.R.C.P. 1.

THIS ADA CLAIM CANNOT BE BARRED BECAUSE OF THE FIRST AMENDMENT

As a general rule, the ADA, by its very terms, applies to religious institutions. Under 42 U.S.C. § 12113(c), the character of defenses available to religious entities is severely curtailed. The general rule is that religious entities must conform to the ADA, although a logical available defense is that a religious entity may discriminate on the basis of religion, i.e., their employees adhering to their "religious tenets". 42 U.S.C. § 12113(c)(2).

Indeed, the relatively recent federal regulations governing compliance by religious entities with the ADA broadly mandate compliance by religious entities with all aspects of the ADA. *See* 29 C.F.R. Part 1630.16 (A), which was attached as Exhibit "D" to plaintiff's Opposition to the Motion for Summary Judgment, which, while permitting to religious entities the requirement of particular religious affiliations, go on to state that:

> However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

29 C.F.R. 1630.16(A).

Defendants argued that Munholland United Methodist Church compliance with the ADA will foster an "excessive governmental entanglement with religion" for purposes of the third prong of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test. In advancing this argument, the church argued that compliance with the ADA will result in "a real and substantial burden" upon the defendants, because they have "engaged in a time-consuming and expensive defense" of Ms. Starkman's claims. Defendants Brief in Support of their Motion for Summary Judgment, at 13. First, this "burden" is no different than that upon any other defendant citizen of the United States covered by the ADA. Secondly, this "burden of defense" could have been avoided entirely by defendants by simply not violating the ADA in the first place, or, once having violated the ADA, simply by fairly compensating their victim of the violations, i.e., Ms. Starkman, instead of choosing to engage "in a time consuming and expensive" defense of those violations.

Plaintiff showed that the defendants argument regarding the burdensome and expensive nature of ADA compliance for them was flatly contradicted by their own literature published by defendants, and submitted to the trial court in opposition to the summary judgment motion but not included in the record excerpts: (1) an excerpt from the Journal of the Twenty-third Session of the Louisiana Annual Conference of the United Methodist Church, South Central Jurisdiction, which:

(a) effusively praises the ADA; (b) nominates October 17, 1993 to be "Access Sunday"; and (c) points out that the Methodist Churches must be made totally accessible, more comfortable and welcoming to all. Obviously, defendants considered the ADA to be a "good thing" in 1993. Why should their attitude have changed in 1997? These defendants were arguing, in 1997, that compliance with the ADA was suddenly a "bad thing", compliance being a "burden" and "expensive". This surprising fact tends to bolster Ms. Starkman's complaint, arguments, and supporting evidence, that these defendants are not interested at all in their compliance with the ADA; to the contrary, they instead seek actively to avoid ADA compliance. Additional Exhibits published by the defendants tended to show that their objection of "entanglement" made by the defendants in their briefs, through which they seek to circumvent and to avoid compliance with the ADA, are not accurate statements on their part. An excerpt submitted to the trial court, from; (2) "Accessibility Audit For Churches, A United Methodist Resource Book about Accessibility", makes the point in general that the United Methodist Church affirms compliance with the ADA, and affirms access for those who are chemically sensitive as well. Exhibit "G" was attached to plaintiff's Opposition Memorandum to Motion for Summary Judgment, entitled "Loving Justice, the Responsibilities of the Religious Community under the Americans with Disabilities Act,", showing mandatory compliance with the ADA on the part of the defendants. Exhibit "H", showed the Methodist "Book of Resolutions", approving of and mandating United Methodist Church compliance with the ADA. By including the defenses available to religious entities described by 42 U.S.C. § 12113(c) and 29 C.F.R. 1630.16(A), Congress sought to eliminate "entanglement" problems described in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). However, the outright noncompliance with the ADA sought by the Rev.

Evans and the Munholland United Methodist Church led by him on the grounds of "burden" or "expense", was *never an option offered by Congress in its passage of the ADA.* Furthermore, it is the defendant's insurance company, and not the defendants, who are paying for the defense of this complaint.

The jurisprudence developing under the ADA and other civil rights statutes has not hesitated to apply these civil rights statutes to churches. In *Gargano v. Diocese of Rockville Centre*, 80 F.3d 87 (2nd Cir. 1996), the Second Circuit found that the Establishment Clause was no bar to an employee's suit against a religious school alleging violations of the Age Discrimination in Employment Act. The court noted that religious groups are generally not immune from all governmental regulation of their employment relationships, or from court enforcement of those laws. Similarly, in *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, (8th Cir. 1994), an ADEA claim by a former administrator of a religious institution was held to not pose a significant risk of infringement on the First Amendment, and therefore the religious institution was not immune from the ADEA claim. This case bears a striking similarity to *Weissman*, and is not distinguishable from *Weissman* as found by the trial court.

In *Dole v. Shenandoah Baptist Church*, 899 F 2d 1389 (4th Cir. 1990), the Fourth Circuit held that the Fair Labor Standards Act applied to church-operated schools and employees, and did not violate any First or Fifth Amendment rights of the church or its teachers or employees. In *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F 2d 1362 (9th Cir. 1986), the Ninth Circuit concluded that the exemptions from Title VII and the Equal Pay Act did not prohibit the application of those statutes to a religious school. No Free Exercise or Establishment Clause

violations were found, allowing the court to prohibit a discriminatory health insurance practice engaged in by the religious school. And, in *DeArment v. Harvey*, 932 F.2d 721 (8th Cir. 1991), the court found that the First Amendment did not prohibit application of the Fair Labor Standards Act to a church school.

Although jurisprudence under the ADA itself remains somewhat limited, several District Court decisions have recognized that the ADA applies to religious institutions generally, and have not dismissed employee suits on First Amendment grounds. *See Volk v. Pribonic*, 1996 WL 230103 (W.D. Pa. 1996), or *Davis v. Cottage Hill Baptist Church*, 1995 WL 795673 (S. D. Ala. 1995).

The case primarily relied upon by defendants, *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), is highly distinguishable. In *Rayburn*, the plaintiff was applying for the job of associate pastor! Obviously, an associate pastor is in fact covered by the "ministerial exception", as the associate pastor is unquestionably a member of the clergy. This Court obviously cannot constitutionally instruct a church concerning who it should and who it should not make into a minister. This is a fundamental constitutional bar, prohibiting the state's intrusion into ecclesiastical matters. Plaintiff cannot and does not dispute this fundamental principle underlying the "ministerial exception". However, the plaintiff in *Rayburn* was an associate pastor, not a lay employee like Ms. Starkman. As the declarations submitted into evidence in opposition to the motion for summary judgment abundantly showed, Ms. Starkman was a lay employee, not a member of the clergy. She was never a member of the clergy. Her duties were of a secular nature, and she does not meet the "primary duties" test of *Rayburn*. Ms. Starkman's Declarations were attached as

RE Exhibit "10", TR 00095-00102, 00497-00499, describing her job duties in detail, see also Exhibit "10", TR 00103-00108, as corroboration of there facts. Additionally, *Rayburn* is an older Fourth Circuit case which is not controlling in the Fifth Circuit and which appears to suffer from dubiously overbroad reasoning. *Rayburn* should not be followed by the Court in this case.

The defendants obvious hostility towards the Americans with Disabilities Act is puzzling. What possible "entanglement" problems could arise from simple compliance by defendants with the access, reasonable accommodation, and prohibitions against the discrimination against disabled persons, *as they profess*? All of the defendants literature submitted into evidence, with the exception of the defendants brief, praise the ADA as a "good thing" for defendants to follow, with which the Court should simply mandate compliance.

Obviously, the facts must be construed in favor of the non-movant plaintiff in consideration of the motion for summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S. Ct. 1348 (1986), *Celotex Corporation v. Catrett*, 106 S. Ct. 2548 (1986) and *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505 (1986). Ms. Starkman was never covered by the "ministerial exception" as shown by the overwhelming evidence, and at minimum this shows a valid *bona fide* material fact in dispute. This Honorable Court should not hesitate to enforce the ADA by the granting of certiorari and the reversal of these rulings.

The judgments below are founded on several false legal and factual findings.

The defendants first sought a protective order limiting the questioning surrounding the defendants' depositions. The

protective order was opposed by plaintiff. The Magistrate ruled that although instances of alleged domestic violence on the part of defendant Evans and 911 emergency calls originating from his house could not be inquired into, the specific reasons behind the recommendation made by the Pastor Parish Relations Committee to terminate the employment of defendant Evans was fair grounds for discovery. Plaintiff appealed this ruling to the District Court, presenting evidence suggesting that the alleged violence against a disabled person and the 911 call was actually one of the reasons for the termination recommendation made against defendant Evans, which termination recommendation was later not followed. The District Court remanded the issue for reconsideration by the Magistrate. Upon reconsideration, the Magistrate granted plaintiff some relief, and broadened the acceptable scope of the 911 call questions. A separate motion to compel also had to be filed against the defendants, due to their failure to comply with other discovery obligations. At the same hearing, the Magistrate ordered defendants to produce certain information that had been withheld by them. Thus, the several obstacles erected by defendants to discovery having been removed, the depositions of the defendants proceeded on August 20 and 21, 1998, in preparation for the court-ordered alternative dispute resolution, and trial, if necessary. On August 25, the lengthy Exhibit and Witness lists were timely filed by plaintiff, sixty days before the final pretrial conference. However, on August 31st, this case was dismissed, in a trial court opinion filled with significant legal and factual errors. The Fifth Circuit upheld the dismissal, affirming the errors.

THE SO CALLED "MINISTERIAL PRESENCE" DESIGNATION

On page seven (7) of the Fifth Circuit decision, the Court acknowledges that the defendants must show — as a completely undisputed fact — that the plaintiff "engaged in activities traditionally considered ecclesiastical or religious," including whether the plaintiff "attends to the religious needs of the faithful." On page seven (7) of it's decision, the Court states "While Ms. Starkman claims that attending to the 'religious needs of the faithful' was not a primary duty, she admits that she was designated to be a 'ministerial presence' to ailing parishioners *on occasion.*" First, this so called "ministerial presence" designation only took place on only one occasion — only once! The Court used the phrase "on occasion.", which implies "occasionally", or, at many different times. This is simply not true. Ms. Starkman's affidavit clearly states that she was only asked once to visit one sick parishioner — on only *one* occasion — in five years of employment — because none of the ministers wanted to visit this person on that particular day. *See* RE Exhibit 10. Furthermore, this was a unilateral declaration on the part of defendant minister Evans made simply to solve a scheduling problem. One hospital visit in five years of employment can hardly qualify in good conscience as a "primary" duty! This Court has a paramount duty to objectively view the evidence in the light most favorable to the plaintiff, not in the light most favorable to the defendant. Additionally, this error in the panel opinion occurred on the factor which the Court viewed as the most important factor.

Secondly, the defendants failed to establish — as a matter of law — that the plaintiff primarily "engaged in activities traditionally considered ecclesiastical or religious".

First, the Court, relying upon *EEOC v. Southwestern Baptist*, 651 F.2d 277, 285 (5th Cir. 1981), found that plaintiff performed primarily "traditionally ecclesiastical or religious" tasks. However, it is virtually undisputed that this is *not* the case. Plaintiff vigorously contested this allegation in her two Declarations submitted in opposition to the defense motion. *See* RE Exhibit 10, flatly affirming the secular nature of her employment. This was corroborated by the Declaration of a second witness, Ms. Catherine Black, also timely submitted in opposition to the motion for summary judgment, attesting to the primarily secular nature of Ms. Starkman's employment as a mere music director. More importantly, the defendants admitted during their depositions that this is not the case. Defendant Evans, when asked whether Ms. Starkman was a secular employee, answered that "In terms of ecclesiastical law for our particular denomination, *yes.*" *See* Evans Depo, Excerpt, pg 176, lines 5-7, RE, Exhibit "6", and the Kreutziger Deposition, pgs 36-39, RE, Exhibit "7", timely submitted in opposition to the defense motion for summary judgment. These admissions in defendant's deposition excerpts are completely consistent with the countervailing affidavits submitted by the plaintiff showing that her job description was entirely secular, RE Exhibit "10", as well as by the documentary evidence showing that by the Methodist Churches own definitions, rules and regulations, Ms. Starkman was never ordained, did not perform and was not qualified to perform sacraments, RE Exhibit "11", TR 00042, 00500-00503, did not appear on any official lists of ministers, RE Exhibit "8", TR 00481-00496, and did not qualify under any federal tax law for any special tax treatment for religious clergy, since she was not a religious clergy member, only a music teacher, RE Exhibit "12", TR 00504-00518. According to "Black's Law Dictionary", Fifth Edition, 1979, the word "secular" is defined as "Not spiritual; not ecclesiastical; relating to the affairs of the present (temporal)

world." Therefore, this admission on the part of the defendants of the completely "secular" nature of Ms. Starkman's employment destroys the applicability of the *Southwestern* "primarily ecclesiastical tasks" test. At the absolute minimum, this showed that a *bona fide* factual dispute exists here, amply sufficient to defeat summary judgment in this case. A paper "mini-trial" should not have been conducted at this juncture.

The Court of Appeal for the Fifth Circuit recognized that the plaintiff is not a clergy person, conceded in the panel opinion that the facts were weak, and sought to fit her into some kind of a gray area of non-clergy. The gray area nature of this itself counsels against the granting of any summary judgment, as the facts are to be viewed in the light most favorable to the plaintiff, not to the defendants, as the courts below appear to have done.

Furthermore, the defendants were presented at their depositions with three comprehensive lists of local ministerial appointments. Both defendants had to concede that Ms. Starkman was not found on any of the lists due to the *secular* nature of her employment. Those lists were timely submitted in opposition to the motion for summary judgment, and were found at RE Exhibit "8", and the deposition excerpts at RE Exhibits "6" & "7". Both defendants admitted under cross-examination that Ms. Starkman was not a clergy person, did not have any pension benefits associated with being a member of the clergy, was not ordained as a minister, was never consecrated, was not a pastor, was not licensed as a pastor or clergy, and had never been consecrated as a diaconal minister. The Court cannot then improbably conclude that, unbeknownst to plaintiff, she was actually a "spiritual leader", in a *retroactive consecration*, performed solely to evade lawful, and just, ADA liability!

THE SO CALLED "PERFORMING OF THE CEREMONIES"

The court acknowledges on page six (6) of the ruling that defendants must show — as a completely undisputed fact — that "the plaintiff was qualified and authorized to perform the ceremonies of the Church." Plaintiff never performed any ceremonies, nor was she permitted to perform any ceremonies since she was not qualified to be a minister. The trial court opinion viewed as very significant and relied heavily upon the supposed fact that the plaintiff led the congregation in singing on Sunday. This supposedly "undisputed fact" is completely false, and was successfully controverted by the sworn affidavit of plaintiff, submitted at the trial level and unrebutted by defendants. Defendants do not contend that Ms. Starkman ever performed any ceremonies of the church, since she was simply unqualified to do so. *See* unrebutted Starkman affidavit at RE 10. The panel decision ignored this fact. The plaintiff never led the congregation in singing. *See* RE 10. Plaintiff had no microphone, and did not stand in front of the congregation leading them, or holding herself out as a leader or preacher. Plaintiff does not understand where this assumed factual conclusion came from, but it is totally inaccurate. Plaintiff merely directed the choir. Her back faced the congregation. The trial court mistakenly used this inaccurate information from unknown sources to controvert plaintiff's sworn Declaration, and discounted the accurate Declaration in favor of the unknown, inaccurate information, in effect conducting an impermissible "mini-trial". The trial court should have just recognized the existence of the *bona fide* factual dispute here and scheduled the trial. This merely highlights the *bona fide* factual dispute. The court stated "plaintiff's role was undeniably to lead the congregation in singing during the Sunday worship services". Order and Reasons, Pg. 8. This is simply not true. *See* plaintiff's uncontradicted Declaration, at RE 10.

The plaintiff, contrary to the conclusion of the Court on page 8 of the "Order and Reasons", was never authorized to perform any ceremonies of the Church under *Southwestern*, and did not qualify to perform any ceremonies or sacraments. In *General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, County of San Diego*, 439 U.S. 1355, 1369, 99 S. Ct. 35, 58 L. Ed. 2d 63, 77 (1978), and in rejecting the claims raised by the United Methodist Church in that case, the Supreme Court of the United States made clear that the courts could constitutionally conduct their own inquiry into the structure and operation of a church consistent with the First Amendment. In so doing, the court may examine pertinent information generated by the church, such as the Methodist Book of Discipline. As that publication and her Declaration make clear, Ms. Starkman was never authorized to perform ceremonies or administer sacraments, and she at no time "led the congregation" in singing. *See* Paragraphs 330-331, Book of Discipline, submitted in evidence as RE Exhibit 11. Surely the court should consider the Church's definition of sacraments and ceremonies as determinative under *Southwestern*, in lieu of creating an unprecedented "legal" definition of a new ceremony or sacrament, unrecognized by the Church, in an ill-founded attempt, based on incorrect information, to elevate the mere conducting of a choir to the sacramental.

Ms. Starkman never participated in pastoral counseling, not even for choir members. Her telephone contacts with choir members concerned choir business, rehearsals, etc., and did not concern pastoral counseling. *See* RE 10.

Many of the cases cited by the Order and Reasons involve religious denominations such as the Baptists or the Seventh Day Adventists. The United Methodist Church, unlike such

denominations as the Seventh Day Adventists and the Baptists, is a religious institution which has very strict written requirements and a well defined process by which a person may become a minister, clergy, or pastor. As this Supreme Court of the United States has made clear, such factors may be considered by the lower courts in determining the scope of the First Amendment.

It is poor public policy to deprive a completely secular employee of civil rights protections, under an ill-founded application of the "ministerial exception", where the right of the church to choose its ministers is not being threatened, where illegal discrimination against the disabled is not conduct worthy of deference, and where such a secular church employee enjoys no church-related benefits either, such as a church pension or retirement benefits. There is no *quid pro quo* there. Additionally, plaintiff is entitled under federal law, specifically federal tax law, to no special tax treatment because of the First Amendment. Under federal tax law, the only persons who qualify for special tax exemptions because of the First Amendment are ministers who are duly ordained, commissioned, or licensed by a religious body, Christian Science practitioners, and members of religious orders who have not taken a vow of poverty. The applicable federal religious tax exemptions materials were attached as RE 12. Federal law in this area is highly persuasive, and again illustrates that under the current posture, the plaintiff is left with neither her civil rights protections nor any religious benefits, although considered to be a secular employee by the federal government for tax purposes, and by her church employer, but not by the court for ADA purposes. This is illogical and unfair, especially where, as here, the courts determination is based on inaccurate, and unsworn, information.

DEFENDANTS CLEARLY FAILED TO CARRY THEIR BURDEN OF PROOF JUSTIFYING A PRE-TRIAL DISMISSAL

As seen from the evidence above, the defendants clearly failed to show that any of the critical factors identified by the panel opinion were actually undisputed. The defendants failed to show — as a completely undisputed fact — that the plaintiff's "primary functions served [the church's] spiritual and pastoral mission". The defendants failed to show — as a completely undisputed fact — that " the plaintiff was qualified and authorized to perform the ceremonies of the Church." Finally, the defendants failed to show — as a completely undisputed fact — that the plaintiff "engaged in activities traditionally considered ecclesiastical or religious," including whether the plaintiff "attended to the religious needs of the faithful." The judgments below must be reversed.

Finally, both the trial court and panel decision placed great significance in granting summary judgment upon plaintiff's unsworn and unsigned answers to two interrogatories, (in violation of Rules 56 and 33) to which plaintiff timely interposed an objection to the confusing and arbitrary distinctions drawn by the wording of the interrogatories. The answer was not signed by the party making them, the plaintiff, as required by Rule 33(b)(2), and therefore, by extension, by Rule 56(e). Only the objection was signed by the attorney making the objection, as required by Rule 33(b)(2). The defendants could have moved to require signed and sworn answers to those interrogatories, before relying upon them for their motion, but they failed to do so. The interrogatories were therefore not properly considered for purposes of Rule 56. The text of the objectionable and contorted question asked by interrogatory 6 follows:

INTERROGATORY NO. 6:

Did you have any religious *or worship-oriented* job duties, responsibilities, or functions while you were employed as the Director of Music by Defendant Munholland? If so, state the following for each such duty, responsibility, or function:

a. The name and description of the duty, responsibility, or function;

b. The amount of time (in hours) spent performing the duty, responsibility or function during a normal or regular work week; and

c. Whether the duty, responsibility, or function was essential to your performing satisfactorily as the Director of Music.

Objection. The question is vague and subject to excessive subjective interpretations regarding terms such as "religious or worship-oriented job duties, responsibilities . . . etc. . . . Subject to these objections, the following response is offered . . .

Therefore, the form of the question was misleading and confusing to plaintiff and to plaintiff's counsel. This objection is still outstanding and was never been ruled upon by the Court.

This objection is a valid one, and was interposed to prevent precisely this type of misunderstanding from arising.

Some of the supposed "ecclesiastical", or "religious", or "worship oriented" functions listed by plaintiff in her comprehensive response, which under her interpretation of the

question encompassed her entire job description, were tasks like attending staff meetings, supervising renovations, directing the choirs, rehearsals, teaching and practicing voice, piano, and organ, obtained price quotes for equipment, filling out purchase orders, maintaining the library, etc.. Can it really be said that these functions are unquestionably traditionally "ecclesiastical", or "religious" for purposes of granting summary judgment? Of course it cannot. As can be seen by the plaintiff's Declaration of record at RE 10, the question was improper, as subject to wildly differing interpretations. Plaintiff interpreted the question at the time very simply. She worked at a church, therefore, everything that she did was ultimately "worship-oriented" (whatever that means!) because it helped the church function as a church. Therefore, plaintiff logically listed *all* of her job duties under this question. Plaintiff was afraid that if she listed "non-worship-oriented" functions, that this could be used against her later in this litigation as "proof" that she was not performing her job in a manner which assisted her employer (a "worship-oriented" church), and therefore these alleged "non-worship-oriented" (!) functions would be inflated into "valid non-discriminatory reasons" for her firing.

Plaintiff interpreted this question exactly like an accountant at an oil refinery could have interpreted his employment, when asked by his employer as to how much of his work was "oil-refinery-work-related". Although he never set foot in the refinery portion of the plant, and exclusively did accounting in an office, he could interpret the question to mean that either all, or none, of his accounting was "oil-refinery-work related", depending upon his interpretation.

It is manifestly unfair and unjust to grant summary judgment against the plaintiff on the basis of two unsigned, unsworn, misunderstood, and timely objected to questions,

while completely ignoring all of the voluminous evidence favorable to plaintiff, especially since she attempted to clear up this misunderstanding in her sworn and signed Declaration, fully consistent with Rule 56(e), which was improperly given no weight by the Court upon summary judgment in illustrating a factual dispute.

Fully consistent with her interpretation, only non-essential, trivial, and extraneous "job functions" were listed in Interrogatory No. 7, which was also objected to, unsigned and unsworn by plaintiff, and which ambiguously called for "non-religious or non-worship-oriented" matters.

Based on the information presented herein, it is clear that this Honorable Court should reverse the rulings below, which dismissed plaintiff's case without a trial.

One wonders what else could be necessary to demonstrate the existence, at minimum, of a *bona fide* factual dispute on this narrow issue in a federal trial court?

CONCLUSION

The decision should be reversed, because the federal court system should unhesitatingly seek to protect the rights of the disabled from discrimination, and should not allow inapplicable considerations to confuse and dissemble the real issues. Here, the church's right to choose its own ministers is not being questioned or threatened, and reinstatement is not being sought. This right of the church to choose its own ministers is the proper place for the "ministerial exception", not some unwarranted and unnecessary extension of the "ministerial exception" into non-ecclesiastical, secular areas in which it does not and should not apply. This exception to fundamental civil rights laws certainly should not be abused, stretched, and expanded to impermissibly protect illegal discriminatory conduct towards the disabled, as recognized by the Ninth Circuit in *Bollard*. Furthermore, the decision should be reversed, to assure that litigants in the federal judiciary receive fair trials, and do not have their valid and substantial claims dismissed on unwarranted grants of summary judgment, where they have, as here, submitted ample controverting evidence, at their great expense, clearly demonstrating the existence of genuine, and *bona fide*, material issues of fact in dispute, warranting a fair trial on the merits of the dispute. The disabled citizens of this country deserve nothing less.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 27, 1999

Melanie K. STARKMAN,

Plaintiff-Appellant,

v.

Tommy N. EVANS, also known as Nick Evans, individually and in his official capacity as Senior Pastor of Munholland United Methodist Church; Munholland United Methodist Church,

Defendants-Appellees.

No. 98-31183.

United States Court of Appeals,
Fifth Circuit.

Dec. 27, 1999.

* * *

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA, JOLLY and WIENER, Circuit Judges.

Appendix A

REYNALDO G. GARZA, Circuit Judge:

BACKGROUND

In December, 1992, Defendant Munholland United Methodist Church ("the Church") hired Plaintiff Ms. Starkman, who served as Choirmaster and Director of Music. Ms. Starkman's supervisor at the Church was the Reverend Tommy N. Evans. During her employment, Ms. Starkman allegedly suffered various disabilities, including asthma, osteoarthritis in both knees, migraine headaches, and endometriosis. According to Ms. Starkman, the defendants unreasonably failed to allow her requests for work schedule changes to permit her recovery after knee surgery. In addition, Ms. Starkman, having suffered chemical exposure from cleaning materials, claims that the defendants refused to accommodate her sensitivity to chemicals.

In May, 1995, when the Church terminated Ms. Starkman's employment, she filed suit against the Church and Rev. Evans, alleging that her discharge violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and a Louisiana retaliatory discharge statute, La. R.S. § 23:1361. The defendants filed a motion for summary judgment, which the district court denied as it related to the prescription of Ms. Starkman's state law claims. The basis of this decision was that Ms. Starkman's filing of a claim with the Office of Worker's Compensation ("OWCA") within the one-year period properly interrupted the prescription. However, having concluded that Rev. Evans did not qualify as an "employer," the district court summarily dismissed both claims against him. It also granted the motion

for summary judgment as to her retaliatory conduct and ADA claims against the Church, holding that Ms. Starkman's position as a choir director was within the parameters of this Circuit's First Amendment "ministerial exception" to employment discrimination claims. After filing a motion for reconsideration, which was denied, this appeal followed.

ANALYSIS

Courts of Appeals review summary judgments *de novo,* applying the same standard as the lower court. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Under Federal Rule of Civil Procedure 56(c), summary judgments "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Free Exercise Clause of the First Amendment[1] bars Ms. Starkman's claims under the Americans with Disabilities Act and Louisiana employment law. In *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.1972), the Fifth Circuit first articulated the "ministerial exception" to employment discrimination claims. In *McClure,* this court held that the

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1. The defendants have not attempted to justify the dismissal of Ms. Starkman on nondiscriminatory or religious grounds. Thus, there has been no intrusion by the state into the internal governance of the Church, and the district court was correct in holding that the Establishment Clause cannot bar the plaintiff from proceeding. *See EEOC v. Mississippi College,* 626 F.2d 477, 487 (5th Cir.1980).

application of the provisions of Title VII to the employment relationship existing between the plaintiff and her church "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause." 460 F.2d at 560. This court found that only in rare instances where a compelling state interest in regulation of the subject within the state's constitutional power to regulate is shown can a court uphold a state action which imposes even an incidental burden on the free exercise of religion. *Id.* at 558; *see also Combs v. Central Texas Annual Conference of the United Methodist Church,* 173 F.3d 343 (5th Cir.1999) (this court's most recent affirmation and discussion of the Free Exercise Clause's bar to an employment discrimination claim filed by a church's spiritual leader).

McClure involved an ordained minister suing the Salvation Army under Title VII after she was discharged by the religious organization. In this court's view, Congress did not intend, through nonspecific wording of provisions of the Civil Rights Act relating to equal employment opportunities, to regulate the employment relationship between church and minister. *McClure* 460 F.2d at 553. The facts of the present case, however, are somewhat distinct from those in *McClure.* First, instead of the plaintiff being an ordained minister as in *McClure,* here she is a choir director. Second, instead of the plaintiff bringing a Title VII claim, here she has complained on the basis of the ADA and the Louisiana retaliatory discharge statute.

And yet, the "ministerial exception" outlined in *McClure* should be extended to the case now before us because, like

the ADA and the Louisiana retaliatory discharge statute at issue in the instant case, Title VII is an anti-discrimination and anti-retaliation statute.[2] Furthermore, as we discuss below, Ms. Starkman's position as a choir director required her to perform ministerial functions that warrant the First Amendment's protections against undue interference with the personnel decisions of churches and religious leaders.

If Ms. Starkman is considered a "minister" and falls under the exception, this Court may not inquire into her employment and must dismiss her suit against the Church. On the other hand, if Ms. Starkman's position as a choir director merely required her to "perform tasks which are not traditionally ecclesiastical or religious," the Church is not "entitled to *McClure*-type protection" under the Free Exercise clause. *EEOC v. Southwestern Baptist,* 651 F.2d 277, 285 (5th Cir.1981). No Fifth Circuit case dealing with the ADA has as yet held that a choir director qualifies as a "minister" for purposes of the "ministerial exceptions" under *McClure.*

To determine whether Ms. Starkman qualifies as a "spiritual leader" for purposes of the ministerial exception, this court will examine the employment duties and requirements of the plaintiff as well as her actual role at the church. *Southwestern Baptist,* 651 F.2d at 285. The status of employees as ministers for purposes of *McClure* remains a legal conclusion for this court. *Id.* at 283. *EEOC v. Catholic University of America* makes it clear that "the ministerial

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2. Defenses available to and treatment of religious institutions for purposes of the ADA are addressed under 42 U.S.C. § 12113(c).

exception has not been limited to members of the clergy." *EEOC v. Catholic University of America* 83 F.3d 455, 461 (D.C.Cir.1996) (citing *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1169 (4th Cir.1985)). The "ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." *Catholic University,* 83 F.3d at 463. Furthermore, the defendants are not required to advance a theological or religious explanation regarding its allegedly illegal employment actions. *See EEOC v. Catholic University of America,* 83 F.3d 455, 465 (D.C.Cir.1996) (finding that the "focus of the ministerial exception is on the action taken, not possible motives.").

The question of who qualifies as a minister requires this court to evaluate several factors. First, this court must consider whether employment decisions regarding the position at issue are made "largely on religious criteria," *Southwestern Baptist,* 651 F.2d at 283. Yet, merely serving as "exemplars of practicing Christians" is insufficient under *EEOC v. Mississippi College,* 626 F.2d 477, 485 (5th Cir.1980). Although Ms. Starkman argues that she was hired strictly on the basis of her qualifications as a choir director, it is clear that her job requirements went above and beyond mere musical issues. To be certified as a Director of Music Ministry, she was not only required to have a masters in music, but also extensive course work in Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine and Polity. The job description for Director of Music, states that

"the Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and congregational participation in all aspects of this ministry at Munholland United Methodist Church." Furthermore, there is no dispute that religious music plays a highly important role in the spiritual mission of the church. Thus, it seems clear that the job specifications required Ms. Starkman to be educated in religion and serve as a spiritual leader.

Second, to constitute a minister for purposes of the "ministerial exception," the court must consider whether the plaintiff was qualified and authorized to perform the ceremonies of the Church. *Southwestern Baptist,* 651 F.2d at 284. Ms. Starkman had several religious duties and responsibilities. For example, she was required to plan worship liturgy, coordinate church and worship activities relating to the church's Music Ministry, rehearse with choirs and conduct those choirs, hire musicians and lower level music ministry directors, and write articles about the church's Music Ministry for the weekly church bulletin, introducing liturgical seasons for worship services. Ms. Starkman, in her Answers to Interrogatories, lists twenty-one duties under the category of religious or worship-oriented job duties, compared to only three entries for nonreligious, nonworship-oriented, or secular duties. She also lists nineteen of the twenty one religious tasks as "essential," while she designates all of her three nonreligious duties as "not essential."

Third, and probably most important, is whether Ms. Starkman "engaged in activities traditionally considered ecclesiastical or religious," *Southwestern Baptist,* 651 F.2d

at 284, including whether the plaintiff "attends to the religious needs of the faithful," *Mississippi College*, 626 F.2d at 485. While Ms. Starkman claims that attending to the "religious needs of the faithful" was not a primary duty, she admits that she was designated to be a "ministerial presence" to ailing parishioners on occasion. She also concedes that, for her and her congregation, music constitutes a form of prayer that is an integral part of worship services and Scripture readings.

The evidence, when examined in the light most favorable to the Plaintiff, indicates that Ms. Starkman did serve as a spiritual leader and thus properly falls under the rubric of this court's ministerial exception. Admittedly, the facts of this case regarding the question of who qualifies as a minister are not as strong as those in *McClure* or *Southwestern Baptist*. However, neither is the position of the choir director in the instant case as weak as that of the faculties in *Mississippi College*, who did not serve the role of "intermediaries between a church and its congregation," or attend the "religious needs of the faithful," 626 F.2d at 485, nor is it similar to the support staff, who only served mere administrational functions in *Southwestern Baptist*, 651 F.2d at 284. It is sufficient that Ms. Starkman clearly performed tasks that were "traditionally ecclesiastical or religious." *Southwestern Baptist*, 651 F.2d at 284.

CONCLUSION

Because the evidence shows that Ms. Starkman participated in religious rituals and had numerous religious duties, she qualifies as a "minister" for purposes of the First

Appendix A

Amendment Free Exercise Clause exception to employment discrimination claims. While religious institutions are generally bound by the ADA and other employment discrimination laws, (e.g. a church secretary or janitor may advance an ADA claim if he or she is discharged because of a disability), the facts of this case trigger the Free Exercise Clause's bar against such claims. Therefore, although the district court properly denied the defendant's motion for summary judgment as it related to the prescription of Ms. Starkman's state law claims, the district court's decision to grant summary judgment in favor of the Church and Mr. Evans was correct. Accordingly, we AFFIRM.

APPENDIX B — MINUTE ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED OCTOBER 1, 1998 AND FILED OCTOBER 2, 1998

MINUTE ENTRY
FALLON, J.
OCTOBER 1, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 97-293

SECTION "L" (5)

MELANIE STARKMAN

VERSUS

REV. NICHOLAS EVANS, individually and in his capacity as Senior Pastor of Munholland United Methodist Church, and MUNHOLLAND UNITED METHODIST CHURCH

Before the Court is plaintiff Melanie Starkman's motion for reconsideration of the Court's Order and Reasons dated August 26, 1998, which granted in part and denied in part the defendants' motion for summary judgment, and dismissed the plaintiff's remaining claims. On September 10, 1998 plaintiff filed this motion seeking that the Court reconsider its ruling, in particular its decision that the "ministerial exception" bars her Americans With Disabilities Act claim.

Appendix B

Plaintiff asserts that the Court relied on several mistaken factual findings, thereby leading to erroneous legal conclusions.

After reviewing the parties' briefs, the Court finds that, even accepting the plaintiff's allegations as true, the Order and Reasons dated August 26, 1998 has addressed each of the contentions raised. Accordingly, plaintiff's motion for reconsideration of the Court's Order and Reasons and its subsequent judgment is HEREBY DENIED.

APPENDIX C — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED AUGUST 26, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 97-293

SECTION "L" (5)

MELANIE STARKMAN

VERSUS

REV. NICHOLAS EVANS, individually and in his capacity as Senior Pastor of Munholland United Methodist Church, and MUNHOLLAND UNITED METHODIST CHURCH

ORDER AND REASONS

Plaintiff began her employment as Choirmaster with Munholland United Methodist Church ("Munholland") in December, 1992, and thereafter became the Director of Music. While employed, plaintiff allegedly suffered from a variety of disabilities, including asthma, osteoarthritis of both knees, migraine headaches, and endometriosis. She asserts that defendants refused to modify her work schedule to allow full recovery from knee surgery and, after she suffered chemical exposures from cleaning materials, refused to accommodate her chemical sensitivities. Her employment

was terminated in May, 1995, and plaintiff filed suit against Munholland and Reverend Nicholas Evans, claiming that she was discharged in violation of the Americans with Disabilities Act ("ADA") and Louisiana retaliatory discharge law.

Before the Court is defendants' motion for summary judgment. Defendants have moved to dismiss plaintiff's state law claims on the grounds of prescription. Defendants also contend that Reverend Evans cannot qualify as an "employer" under the ADA, and thus cannot be individually liable for any claims brought under the ADA. Last, defendants assert that plaintiff's claims against Munholland are barred by both the Free Exercise and the Establishment clauses of the First Amendment. For the following reasons, defendants' motion is HEREBY DENIED as it relates to prescription of plaintiff's state law claims and HEREBY GRANTED as it relates to plaintiff's ADA claims against Reverend Evans and state law and ADA claims against Munholland. In addition, because a retaliatory conduct claim is not maintainable against Reverend Evans, plaintiff's state law claims against Reverend Evans must be DISMISSED.

ANALYSIS

A. Prescription of Plaintiff's State Law Claims

Plaintiff was dismissed from Munholland in May, 1995. The plaintiff filed this lawsuit in January, 1997. Defendants contend that claims under La. R.S. § 23:1361 are subject to a one-year prescription period, and that plaintiff's claims are thus barred. Retaliatory conduct in Louisiana is subject

to a one-year prescriptive period, commencing on the date of discharge. *See, e.g., Autrey v. Energy Corp. of America, Inc.*, 594 So.2d 1354, 1358 (La.App. 3 Cir. 1992). However, plaintiff filed a claim with the Office of Worker's Compensation Administration ("OWCA") in September, 1995. Filing such a claim will interrupt prescription on a retaliatory discharge action where the employer received notice of the claim prior to expiration of the prescriptive period. *See Maquar v. Transit Management of Southeast Louisiana, Inc.*, 593 So.2d 365, 367-68 (La. 1992). The Court does not have before it information regarding notice, the length of the OWCA proceeding, or how long after the proceeding's culmination plaintiff filed this action. Defendants do not dispute plaintiff's contention that the prescriptive period was properly interrupted and cannot show that plaintiff's state law claims have prescribed.

B. Reverend Evans' Liability Under the ADA

It is undisputed that plaintiff was employed by Munholland, and not under any personal services contract with Reverend Evans. Defendants contend that individuals cannot be held liable under the ADA, and therefore, plaintiff's ADA claims against Reverend Evans must be dismissed.

The circuit has made it clear that individuals who do not otherwise qualify as "employers," as a sole proprietor would, cannot be held individually liable under Title VII of the Civil Rights Act of 1964 ("Title VII"). *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994). Similarly, the Age Discrimination in Employment Act ("ADEA") provides no

basis of relief against supervisors in their individual capacity. *Stults v. Conoco, Inc.*, 76 F.3d 651 (5th Cir. 1996). As the "ADA's definition of 'employer' mirrors the definitions of 'employer' " in Title VII and in the ADEA, "individuals who do not meet the statutory definition of 'employer' cannot be held liable in their individual capacities under the employment provisions of the ADA." *Kacher v. Houston Community College System*, 974 F. Supp. 615, 618 (S.D. Tex. 1997).

While the circuit has not ruled specifically on individual liability under the ADA, other circuits show the logic of *Kacher*'s reasoning. "Individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA." *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995). Because "the definition of 'employer' in the Disabilities Act is like the definitions in Title VII" and the ADEA, "there is no sound reason to read the Disabilities Act any differently from this Court's reading of Title VII and the Age Discrimination Act." *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996). Although some courts in the past have held that agents of employers may be held individually liable under the ADA for engaging in unlawful discrimination, *see, e.g., Jendusa v. Cancer Treatment Centers of America, Inc.*, 868 F. Supp. 1006 (N.D. Ill. 1994), "the better rule is that individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA," *Hardwick v. Curtis Trailers, Inc.*, 896 F. Supp. 1037, 1039 (D. Or. 1995).[1] Thus, Reverend Evans may not be held individually liable under the ADA.

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1. For a thorough discussion of the holdings of other circuits, see *AIC Security*, 55 F.3d at 1280-1282 (noting that "the more recent

(Cont'd)

Appendix C

C. The First Amendment Bars Plaintiff's Claims Against Munholland

1. The Establishment Clause

Defendants contend that if this Court were to apply the ADA or state employment law to this case, it would violate the third step of the *Lemon v. Kurtzman* test for a violation of the Establishment Clause, fostering an "excessive government entanglement with religion," 403 U.S. 602, 612-613 (1971). Defendants portray their involvement in this suit as an example of the "very process of inquiry leading to findings and conclusions" that can lead to a violation of the Establishment Clause, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

The greatest concern expressed by courts is that they will be "placed in the impermissible position of having to evaluate competing opinions on religious subjects." *EEOC v. Catholic University of America*, 83 F.3d 455, 465 (D.C. Cir. 1996) (internal citations omitted). The Court must avoid disputes that cannot be resolved "without entangling the Government in questions of religious doctrine, polity, and practice," and that contain issues which cannot be analyzed "in purely secular terms." *Id.* at 466 (internal citations omitted). Plaintiff's argument places the Court in just such

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(Cont'd)
and more detailed decisions" counsel against individual liability), and *Wathen v. General Elec. Co.*, 115 F.3d 400, 404 n.6 (6th Cir. 1997) (noting that because "Title VII, the ADEA, and the ADA define 'employer' essentially the same way, an analysis based on Title VII, the ADEA, and the ADA case law is appropriate").

a position. She looks to the *Standards for Certification in Music Ministry in the United Methodist Church* to bolster her position. She cites *The Book of Discipline* in detailing the "specials gifts, evidence of God's grace, and promise of usefulness" that show a "calling" for the ministry. Pla.'s Decl. at 3. Most seriously, she cites "John Wesley's principles of social justice" and the statement of the duties of Christians and Christian ministers in the "Articles of Religion of the Methodist Church" as evidence that the Church should obey the commands of the ADA. Pla.'s Decl. at 7. Similarly, defendants have supported their arguments with reference to the "1994 Ministry of Excellence to Music," as well as excerpts from the *United Methodist Hymnal* and the standards for certification as a Director or Music Ministry. Aff. of Rev. Evans.

While defendants' argument that continual defense of this lawsuit will mean an impermissible entanglement is certainly not without merit, dismissal at this stage of the litigation would be premature. As the merits of plaintiff's discrimination claim have not been presented to the Court, it is not clear if plaintiff has even made out a prima facie case of employment discrimination. The defendants have not yet attempted to justify to the Court plaintiff's dismissal on non-discriminatory or religious grounds.[2] Thus, there has been no intrusion by the Court into the internal governance of Munholland. The circuit is clear that mere "hypothetical concerns," and the "bare potential" that an employment

2. While "conclusory allegations" that plaintiff was dismissed for religious reasons would be insufficient, *Gargano v. Diocese of Rockville Centre*, 80 F.3d 87 (2d Cir. 1996), a genuine religious dispute would pose different issues for the Court.

discrimination inquiry would impact religious beliefs "does not warrant precluding the application" of the law to religious employers. *EEOC v. Mississippi College*, 626 F.2d 477, 487 (5th Cir. 1980). Thus, the Establishment Clause cannot at this stage bar plaintiff from proceeding.

2. Free Exercise Clause

The Court next turns to the issue of whether plaintiff's claims against Munholland are barred by the Free Exercise Clause. In *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), the Fifth Circuit became the first circuit to articulate the "ministerial exception" to employment discrimination claims. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). In *McClure*, the circuit held that "the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister . . . would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause." 460 F.2d at 560.

If plaintiff is considered a "minister" and falls under the exception, this Court may not inquire into her employment and must dismiss plaintiff's claims against Munholland. Conversely, if plaintiff was simply "employed to perform tasks which are not traditionally ecclesiastical or religious," she is not "entitled to *McClure*-type protection" under the Free Exercise clause, *EEOC v. Southwestern Baptist*, 651 F.2d 277, 285 (5th Cir. 1981), and she may proceed. The Court's determination of plaintiff's "status" as a minister "for purposes of *McClure* remains a legal conclusion." *Id.*

at 283. An individual's designation by an organization is neither necessary nor sufficient to control the designee's "extra-religious legal status." *Id.* Instead, the Court must look to the actual role of the plaintiff at Munholland. Similarly, the "focus of the ministerial exception is on the action taken, not possible motives," *EEOC v. Catholic University of America*, 83 F.3d 455, 465 (D.C. Cir. 1996), and thus a court "may not inquire whether the reason for [the adverse employment action] had some explicit grounding in theological belief." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). Therefore, defendants need not advance a theological explanation regarding its allegedly illegal employment actions.

One factor is whether employment decisions regarding the position at issue are made "largely on religious criteria," *Southwestern Baptist*, 651 F.2d at 283, although it is clear that merely serving as "exemplars of practicing Christians" is insufficient, *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980). Plaintiff claims that her audition was "based strictly on my abilities as a choral director," and that the position "only specified that Christian character was necessary," with "no mention of being a spiritual leader." Pla.'s Decl. at 1, 3. However, the Director's coursework must include the Bible and Theology and the position requires "renewal of spiritual life." Def.s' Statement of Uncontested Fact.

A second consideration is whether the plaintiff was "qualified and authorized to perform the ceremonies" of the Church. *Southwestern Baptist*, 651 F.2d at 284. Plaintiff

maintains that others "preached, led prayers, gave announcements, read scripture, . . . welcomed new members, . . . performed the sacraments, . . . [and led] prayer groups or conduct[ed] Bible studies." Pla.'s Decl. at 2. The defendants counter with plaintiff's own Answers to Interrogatories, in which she lists twenty-one duties under the category of "religious or worship-oriented job duties," compared to only three entries for "nonreligious, nonworship-oriented, or secular job duties." Ans. to Inter. 6 & 7. Plaintiff lists nineteen of the twenty one religious tasks as "essential," while she designates all of her three nonreligious duties as "not essential." *Id.* In addition, while plaintiff now contends that participation in religious ritual and worship was not a primary duty, and that hours on Sunday were not counted as weekly employment hours, Pla.'s Decl. at 4, plaintiff's role was undeniably to lead the congregation in singing during the Sunday worship services. Defendants have submitted a copy of Munholland's 1994 Ministry of Excellence in Music, proclaiming that the "Music Ministry of Munholland United Methodist Church sees music as a gift from God. Making and listening to music can be, therefore, an act of prayer, an expression of faith, and a form of spiritual discipline." Def.s' Ex. 2A.

The third and most pertinent factor is whether plaintiff is "engaged in activities traditionally considered ecclesiastical or religious," *Southwestern Baptist*, 651 F.2d at 284, including whether plaintiff "attends to the religious needs of the faithful," *Mississippi College*, 626 F.2d at 485. Plaintiff currently avers that "virtually all of my primary weekly duties did not consist of teaching, spreading the faith . . . or participation in religious ritual and worship." Pla.'s

Decl. at 4. Again however, plaintiff lists nineteen religious or worship oriented duties as "essential," compared to zero for her non-religious or non-worshipful duties. In addition, plaintiff refers to other "unstated spiritual [and] ministerial" requirements of the job. Pla.'s Ans. to Inter. 7. While plaintiff now declares that attending to the "religious needs of the faithful" was not a primary duty," Pla.'s Decl. at 4, she admits that she was designated to be a "ministerial presence" to one ailing parishioner, and spent "numerous hours at the bedside" of another. Pla.'s Ans. to Inter. 7. This was in addition to frequent "visitation or telephoning of choir members." *Id.* Although her latest submission disputes the centrality of her instruction in religious doctrine, plaintiff listed "Worship/Evangelism meeting and planning of worship liturgy . . . recruitment of choir members . . . [and] spiritual, musical and emotional bonding" as essential duties. *Id.* Plaintiff originally pointed to her need to carry out her "seasonal obligations such as All Saints' Day, Advent, [and] Christmas" and authorship of articles for the Church newsletter introducing "liturgical seasons for worship service." *Id.* And of course, plaintiff, as the Director of Music, was a very visible presence in leading the congregation during the Sunday worship service itself.

Applying the evidence in the light most favorable to the plaintiff to the above factors, the Court finds that plaintiff's position is within the parameters of this circuit's ministerial exception. Although not as undeniably ministerial as the position in *McClure* or that of the faculty in *Southwestern Baptist*, the position is far from the faculty in *Mississippi College*, who clearly did not serve the role of "intermediaries between a church and its congregation," or "attend the

religious needs of the faithful," 626 F.2d at 485, nor is it similar to the support staff who worked in maintenance, or the administrators who supervised finance, maintenance, and other non-academic departments in *Southwestern Baptist*, 651 F.2d at 284. The Director of Music at Munholland was responsible for duties squarely within the conventional understanding of ecclesiastical or religious functions, and was not a position mainly performing "tasks which are not traditionally ecclesiastical or religious." *Southwestern Baptist*, 651 F.2d at 284.

The development of this circuit's ministerial exception by other circuits supports this Court's determination that plaintiff falls within the exclusion. Citing *Southwestern Baptist* and its application to seminarians, *EEOC v. Catholic University of America* makes it clear that "the ministerial exception has not been limited to members of the clergy." 83 F.3d 455, 461 (D.C. Cir. 1996) (*citing Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985)). In fact, the "ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission." *Catholic University*, 83 F.3d at 463 (*citing Rayburn*, 772 F.2d at 1169). In determining whether plaintiff's responsibilities are "essentially religious," the Court must inquire whether her "primary duties . . . consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *Catholic University*, 83 F.3d at 464 (*citing Rayburn*, 772 F.2d at 1169). Because the Court finds that plaintiff's position as Director of Music was essentially religious and primarily served the

spiritual and pastoral mission of Munholland, Munholland is entitled to invoke the ministerial exception to bar all plaintiff's claims against it. Of course, this does not mean that every music director in every church falls within the ministerial exception.[3] But in the case at hand, the plaintiff's duties played an integral role in the ministerial functions of Munholland. For this reason, she is covered by the exception.

D. Reverend Evans' Liability Under State Law

The Court having dismissed plaintiff's state and ADA claims against Munholland and plaintiff's ADA claims against Reverend Evans, the remaining issue is whether plaintiff may proceed against Reverend Evans with her retaliatory discharge claim under La. R.S. § 23:1361. Section 1361(C) states that an employee discharged in violation of the statute shall be entitled to recover civil penalties "from the employer or prospective employer who has violated the provisions of this Section." *Id.* Louisiana state courts interpreting this language have determined that a claim under this section "is one which can be brought solely and

3. The Court notes that mere governance and supervision or a role in outreach is not sufficient. In *Weissman v. Congregation Shaare Emeth*, the Eighth Circuit allowed the former administrator of a Jewish temple to proceed on his employment discrimination claim, despite his position of authority and despite the requirement that he have "a positive attitude towards Jewish life and a Jewish background," an understanding of the Temple's "highest ideals and goals," and the ability to "promote a positive image of the Temple among its members and the public by being accessible and knowledgeable." 38 F.3d 1038, 1040 (8th Cir. 1994). However, the plaintiff there "played no role in decisions relating to spiritual matters." *Id.*

exclusively against the *employer* by an employee who has been unlawfully discharged." *Robin v. Galan*, 545 So. 2d 1129, 1132 (La.App. 5 Cir. 1989) (emphasis added).

Munholland, not Reverend Evans, was the plaintiff's employer. Reverend Evans does not fit the definition of an employer under section 1361, and *Robin* is clear that the plaintiff cannot assert a state law retaliatory discharge claim against him in his individual capacity. Therefore, plaintiff's state law claims against Reverend Evans must be dismissed.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is HEREBY DENIED as it relates to prescription of plaintiff's state law claims and HEREBY GRANTED as it relates to Reverend Evans' liability under the ADA and Munholland's liability under the ADA and state law. In addition, because plaintiff can not maintain a retaliatory discharge action against Reverend Evans, the Court must DISMISS this remaining claim. Therefore, plaintiff's action is DISMISSED with prejudice and with costs.

New Orleans, Louisiana
This 26 Day of August, 1998.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED AUGUST 31, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 97-293

SECTION: L

MELANIE K. STARKMAN

VERSUS

REV. NICHOLAS T. EVANS, individually, Etc., ET AL

JUDGMENT

Considering the Court's Order and Reasons entered herein on August 27, 1998, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Rev. Tommy N. Evans (misidentified as Nichols T. Evans in the complaint) individually, and in his capacity as senior pastor of Munholland United Methodist Church, and Munholland United Methodist Church, and against plaintiff, Melanie K. Starkman, dismissing said plaintiff's complaint with prejudice and costs.

New Orleans, Louisiana, this 31st day of August, 1998.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX E — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 14, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-31183

MELANIE K STARKMAN

Plaintiff – Appellant

v.

TOMMY N EVANS, also known as Nick Evans, individually and in his official capacity as senior pastor of Munholland United Methodist Church; MUNHOLLAND UNITED METHODIST CHURCH

Defendants – Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING
AND REHEARING EN BANC
(Opinion 12/27/99, 5 Cir., __, __ F.3d __)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

Appendix E

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Reynaldo G. Garza
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 14 2000
CLERK

(2)

NO. 99-1827

IN THE
SUPREME COURT OF THE UNITED STATES

MELANIE STARKMAN,

Petitioner,

v.

THE REV. T. NICHOLS EVANS, a.k.a. NICK EVANS, Individually And In His Official Capacity, Etc. and MUNHOLLAND UNITED METHODIST CHURCH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether summary judgment was properly entered and affirmed on Melanie Starkman's discrimination and retaliation claims, where the undisputed evidence showed that, in her position as Director of Music, she was a spiritual leader of Munholland United Methodist Church and, thus, was barred by the First Amendment of the U.S. Constitution from advancing her claims against the Church and its Senior Pastor.

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STATEMENT OF THE CASE

The Petitioner, Melanie Starkman ("Starkman"), was employed from 1992 to 1995 by one of the Respondents, Munholland United Methodist Church ("Munholland Church"), in Metairie, Louisiana. (R-233-34.) She held the positions of Choirmaster and Director of Music. (R-233-34.) Her supervisor was Munholland Church's Senior Pastor, Tommy N. Evans ("Evans"), who is the other Respondent. (R-189.)

In her positions, Starkman had numerous religious duties and responsibilities, as she:

- planned worship liturgy;
- coordinated virtually all Church and worship activities relating to the Church's Music Ministry;
- rehearsed with the choirs (chancel, youth, children's, and bell) and conducted those choirs during worship services;
- hired the Church's organist, youth choir director, youth choir accompanist, and children's choir director; and
- wrote articles about the Church's Music Ministry for the Church's weekly bulletin, *The Munholland Messenger*. Sometimes, her articles introduced liturgical seasons for worship services.

(R-185-91.)

Starkman, in her own words, also had "unstated spiritual [and] ministerial" duties, as Church-members viewed her as a spiritual leader of the congregation. (R-185, 189-91.) Once, she was specifically designated as a "Ministerial Presence" for a visit to a hospitalized Church-member. (R-186.)

During her employment, Starkman drafted a document entitled "1994 MINISTRY OF EXCELLENCE TO MUSIC," in which she stated the purpose of the Church's Music Ministry:

> The *Music Ministry* of Munholland United Methodist Church sees music as a gift from God. *Making and listening to music can be, therefore, an act of prayer, an expression of faith, and a form of spiritual discipline that makes us aware of our relationship to God and to each other.* Within our diversity, then, the *Music Ministry* seeks to offer different ways to express these gifts and reach out and share them with the Christian Community at large.

(R-192 (emphasis added).)

The importance of music to the United Methodist worship is also explained in *The United Methodist Hymnal*, which states that hymns, anthems, and other musical responses are as an integral part of the worship service as prayers, preaching, and Scripture readings. (R-193-96.)

After being hired by Munholland Church for the position of Choirmaster, Starkman received certification from the United Methodist Church as a Director of Music Ministry. (R-191.) As a result, Munholland Church promoted her from Choirmaster to Director of Music. (R-191.)

In order to be certified as a Director of Music Ministry, an individual must meet these standards:

- "A master's degree with a major in music. Graduate courses should include Church Music in Theory and Practice, Choral Conducting, Worship, Choral Vocal Methods, Hymnology, Bible, Theology, Christian Education, and United Methodist History, Doctrine, and Polity."

- "Effective supervised experience for at least two (2) years of employment with full responsibility in music ministry in The United Methodist Church after completion of academic requirements."

- "An expressed commitment to continuing education that includes a planned program that enriches both personal and professional growth. Such a program shall include: 1) reading; 2) study -- individual and group learning events; 3) participation in professional, community, denominational, and ecumenical groups; 4) renewal of spiritual life; and 5) evaluation by the immediate supervisor."

(R-197.)

The job description for Director of Music, which Starkman signed, states that "[t]he Director of Music is responsible for the planning, recruiting, implementing and evaluating of music and congregation participation in all aspects of this ministry at

Munholland United Methodist Church." (R-198.) The job description also states that the Director of Music is to "[w]ork closely with [the] music and[/]or worship committee to plan the overall music program of the church . . . ." (R-198.)

After her employment was terminated by Munholland Church, Starkman filed this lawsuit on January 27, 1997, alleging claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and a Louisiana retaliatory discharge statute, La. R.S. § 23:1361. (R-231, 234, 236.) Munholland Church and Evans filed a motion for summary judgment on December 30, 1997. (R-152.) The district court granted that motion on August 26, 1998, and dismissed Starkman's claims with prejudice. (Starkman's Petition, Appendix C at 12a-24a.) Consequently, on August 31, 1998, the district court entered judgment in favor of Munholland Church and Evans. (Starkman's Petition, Appendix D at 25a.)

Starkman moved for reconsideration of the district court's entry of summary judgment, but that court denied her motion on October 1, 1998. (Starkman's Petition, Appendix B at 10a-11a.) Starkman then filed a notice of appeal to the U.S. Court of Appeals for the Fifth Circuit on October 20, 1998. (R-441.)

The Fifth Circuit affirmed the district court's decision on December 27, 1999. (Starkman's Petition, Appendix A at 1a-9a.) Starkman filed petitions for rehearing and for rehearing en banc, but the Fifth Circuit denied those petitions on February 14, 2000. (Starkman's Petition, Appendix E at 26a-27a.)

SUMMARY OF THE ARGUMENT

The First Amendment of the U.S. Constitution bars courts from reviewing the employment relationship between a church and one of its spiritual leaders. Here, Starkman was the Director of Music for Munholland Church. The undisputed evidence -- including the job description for that position and the importance of music to the Methodist faith, along with Starkman's own answers to interrogatories, in which she listed the numerous religious duties which she performed -- shows that Starkman was a spiritual leader of Munholland Church. Therefore, the district and appellate courts correctly concluded that the First Amendment prohibits Starkman from advancing her claims.

There is *no* conflict among the circuit courts of appeal on the question presented in this case. Both the Fourth and Fifth Circuits have ruled that directors of music are spiritual or religious leaders who, even if not ordained, are barred by the First Amendment from advancing these kinds of suits. A recent Ninth Circuit case does *not* conflict with the Fourth and Fifth Circuit's decisions but, instead, merely recognizes that the First Amendment bar does not apply where the plaintiff was *sexually harassed*. That is not the issue here.

If Starkman's petition were granted, this Court simply would be reviewing undisputed factual evidence and applying non-conflicting case law -- just as the district court and Fifth Circuit already have done. There is no need to examine Starkman's re-hashed contentions any further.

ARGUMENT

The First Amendment prohibits courts from reviewing matters of church administration, such as a church's employment relationship with one of its spiritual leaders. Here, the evidence shows that Starkman had *numerous religious duties* and was a *spiritual leader* in her position as head of Munholland Church's Music Ministry. Thus, the First Amendment bars any court review of her claims.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. As this Court and the Fifth Circuit have pronounced, that language mandates a "wall of separation" between church and government:

> Though that "wall of separation" between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, *it does and must remain high and impregnable*. In *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), it was said, "*We could not approve the slightest breach*."

McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (emphasis added).

This wall has produced a "common thread" which runs through this Court's decisions: "For throughout these opinions there exists 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, *power to decide for themselves, free from state interference, matters of church government* . . . .'" *Id.* at 560 (quoting *Kedroff v. St.*

Nichols Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)) (emphasis added). Thus, "courts cannot adjudicate disputes turning on church policy and administration . . . ." *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1576 (1st Cir. 1989) (citations omitted).

Here, the district court and Fifth Circuit correctly recognized that Starkman's lawsuit violates the First Amendment because it would require an examination of her employment relationship with Munholland Church. That examination would *unduly burden the Church's free exercise of religion* in violation of the First Amendment's Free Exercise Clause.[1]

I. THE FREE EXERCISE CLAUSE

A. The Free Exercise Clause Affords Certain Protections To Churches

This Clause bars courts from reviewing personnel decisions of religious leaders because it "guarantees a church's freedom to decide how it will govern itself . . . and to whom it will entrust its ministerial responsibilities . . . ." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463 (D.C. Cir. 1996). Thus, the Clause prevents statutes like the ADA from encroaching on the ability of a church to manage its internal affairs. *Id.* at 460 (citing *Kedroff*, 344 U.S. at 116). As the Eighth Circuit has stated, "Personnel decisions by church-affiliated institutions affecting clergy are *per*

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[1] It is not unusual for a plaintiff's discrimination or retaliation suit to violate the First Amendment's Establishment Clause, too. *See, e.g., Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168-70 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). A few of the cases discussed in this Brief seem to blur the distinction between the two Clauses.

se religious matters and cannot be reviewed by civil courts . . . ." *Scharon*, 929 F.2d at 363.

The Eighth Circuit's pronouncement is fully supported by abundant case law, including Fifth Circuit precedent upon which the district and appellate courts properly relied. In *McClure*, a minister sued The Salvation Army, which is a church, under Title VII[2] after she was discharged by the church. *McClure*, 460 F.2d at 554. At issue was "whether Title VII . . . applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment." *Id.* at 554-55. The Fifth Circuit ruled that the First Amendment barred the plaintiff from advancing her suit because Title VII's application to the employment relationship between the plaintiff and her church "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *Id.* at 560. The Fifth Circuit also succinctly stated the heart of the issue by noting that the "relationship between an organized church and its ministers is its lifeblood." *Id.* at 558.

The *McClure* case is in lock step with decisions of this Court which dictate that the composition of a church's hierarchy is to be left for the church's sole resolution. *See, e.g., Serbian Eastern Orthodox Diocese for the U.S. v. Milivojevich*, 426 U.S. 696 (1976). As courts have recognized, "*Milivojevich*, read in its entirety, holds that civil court review of ecclesiastical decisions of

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[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Like the ADA and the Louisiana retaliatory discharge statute at issue in this case, Title VII is an anti-discrimination and anti-retaliation statute. (Starkman's Petition, Appendix A at 4a-5a.)

church tribunals, particularly those pertaining to the hiring or firing of clergy, are *in themselves* an 'extensive inquiry' into religious law and practice, and hence forbidden by the First Amendment." *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir.), *cert. denied*, 513 U.S. 929 (1994).[3]

B. The Free Exercise Clause Extends Beyond Clergy-Members And Ordained Individuals To Cover Other Spiritual Leaders, Too

The First Amendment bar also applies to "non-clergy" and "non-ordained" individuals. In *Rayburn*, the plaintiff alleged that she was the victim of sex discrimination when her application for a position as an "associate in pastoral care" was rejected. *Rayburn*, 772 F.2d at 1165. The Fourth Circuit noted that, *even though the plaintiff was not seeking a position as an ordained minister*, the First Amendment bar, which applied to a minister in *McClure*, *"does not depend upon ordination but upon the function of the position."* *Id.* at 1168 (emphasis added). Determining that the position at issue was "important to the spiritual and pastoral mission of the church," the *Rayburn* court articulated this rule: *"[I]f the employee's primary duties consist of teaching, spreading the faith, church governance, supervision*

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[3] *See also Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) ("[C]ivil courts are barred by the First Amendment from determining ecclesiastical questions.") (citations omitted); *Rayburn*, 772 F.2d at 1168 ("Any attempt by government to restrict a church's free choice of its leaders thus constitutes a burden on the church's free exercise rights."). As the Fourth Circuit explained in *Rayburn*, it is not the church's reason(s) for the personnel decision but, more generally, the church's decision itself that the First Amendment protects. *Id.* at 1169 ("[T]he free exercise clause . . . protects the act of a decision rather than a motivation behind it. In these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content."). *See also EEOC v. The Roman Catholic Diocese of Raleigh, N.C.*, --- F.3d ---, No. 99-1860, 2000 WL 667370, at *5 (4th Cir. May 22, 2000).

of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Id. at 1169 (quoting B. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979)) (emphasis added).[4] Thus, someone who may not be a "clergy-member" in the eyes of his or her church may still be a "clergy-member" -- or, better put, a "spiritual leader" -- in the eyes of the First Amendment.

C. The Undisputed Evidence Shows That Starkman Was A Spiritual Leader

Although Starkman contends that the First Amendment bar does not apply because she was not a spiritual leader, the undisputed facts show otherwise. In response to a discovery request asking her to identify "any religious or worship-oriented job duties, responsibilities, or functions while [she was] employed as the Director of Music . . . ," Starkman listed 21 religious duties. (R-185-87.) Among the religious duties which she attributed to herself were:

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[4] *See also Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332 (4th Cir. 1997) (following *Rayburn* and listing cases where the First Amendment bar prevented non-ordained individuals from advancing employment-related lawsuits); *Catholic Univ. of Am.*, 83 F.3d at 463 ("[T]he ministerial exception encompasses all employees of a religious institution, *whether ordained or not*, whose primary functions serve its spiritual and pastoral mission.") (citing *Rayburn*, 772 F.2d at 1169) (emphasis added); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981) (holding that the First Amendment bars the application of Title VII to *faculty* at a seminary), *cert. denied*, 456 U.S. 905 (1982).

- planning worship liturgy;
- coordinating virtually all Church and worship activities relating to the Church's Music Ministry;
- rehearsing with the choirs (chancel, youth, children's, and bell) and conducting those choirs during worship services;
- hiring the Church's organist, youth choir director, youth choir accompanist, and children's choir director; and
- writing articles about the Church's Music Ministry for the Church's weekly bulletin, *The Munholland Messenger*. Sometimes, her articles introduced liturgical seasons for worship services.

(R-185-87.)

Additionally, Starkman responded to this same interrogatory by explaining that she had "unstated spiritual [and] ministerial" duties. (R-185.) Starkman's own recognition of her importance as a spiritual leader, who was integral to the religious mission, function, and operation of Munholland Church, is by itself sufficient evidence to trigger the First Amendment bar to her claims.

That conclusion is buttressed by the undisputed evidence which highlights the importance of music in the Methodist faith. For example, a document which Starkman herself drafted states that "[m]aking and listening to music can be . . . an act of prayer,

an expression of faith, and a form of spiritual discipline that makes us aware of our relationship to God and to each other." (R-192.) Also, *The United Methodist Hymnal* states that hymns, anthems, and other musical responses *are as an integral part of the worship service as prayers, preaching, and Scripture readings.*[5] (R-193-96.)

Interestingly, in a separate interrogatory that *immediately followed* the one asking Starkman to list her "religious or worship-oriented job duties," Munholland Church and Evans asked Starkman to list her "nonreligious, nonworship-oriented, or secular job duties." In response to this latter interrogatory -- and in contrast to the 21 religious duties that she previously had detailed -- Starkman listed only *three* non-religious duties. (R-187-88.) As the district and appellate courts implicitly found, there is no way that Starkman or her counsel could have misunderstood those back-to-back interrogatories. Her answers to those interrogatories are compelling admissions that she was a spiritual leader.

A very recent and very similar Fourth Circuit case is instructive. In *Roman Catholic Diocese*, the plaintiff, a lay Director of Music Ministry, sued the local Roman Catholic Diocese for sex discrimination. *Roman Catholic Diocese*, 2000 WL 667370, at *1. The district court dismissed the action as barred by the First Amendment under the ministerial exception. *Id.* On finding that the Music Director's "primary duties at the Cathedral . . . consisted of the selection, presentation, and teaching of music, which is integral to the spiritual and pastoral mission of the Catholic Church and many other religious traditions," the Fourth Circuit affirmed. *Id.*

---

[5] Additional evidence, such as the standards for a Director of Music Ministry, supports the conclusion that Starkman was a religious leader. (R-189-99.)

Like Starkman here, the EEOC contended that the Music Director's position was not essentially religious in nature but, rather, was primarily secular. *Id. at* *5. The Fourth Circuit disagreed:

> The music ministry and teaching positions at issue are ministerial because the positions are "important to the spiritual and pastoral mission" of the church. . . . The functions of the positions are bound up in the selection, presentation, and teaching of music, which is an integral part of Catholic worship and belief. The Free Exercise Clause therefore bars consideration of the instant employment discrimination claims. To hold otherwise would require us to say that music is substantially devoid of spiritual significance in the life of the church. Such a view cannot stand in light of the role of religious music in worship and the record in this case.
>
> At the heart of this case is the undeniable fact that music is a vital means of expressing and celebrating those beliefs which a religious community holds most sacred. Music is an integral part of many different religious traditions. . . . It serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty. Indeed, the church has presented ample undisputed evidence affirming the centrality of sacred music to the Catholic faith and the importance of music ministry to the faith community. . . .

> Thus, inasmuch as [the Music Director's] duties involve the expression of the church's musical tradition, it is a fallacy to denominate them as merely secular. . . . The efforts of a music minister or teacher can . . . influence the spiritual and pastoral mission of the church as much as one who would lead the congregation in prayer, preach from the pulpit, or teach theology in school.
>
> [The Music Director] was clearly a pivotal figure in most, if not all, aspects of the musical life of the Cathedral . . . . The various job descriptions for the music ministry positions, though not dispositive, unmistakably evince the religious significance of her music ministry. [The Music Director] was required to assist in the planning of liturgies and was in charge of the parish choirs -- functions at the very heart of the church's musical life. The positions also entailed responsibility for recruiting choir members, cantors, and special musicians. . . . The [job] description also conferred upon the Director of Music Ministries responsibility "for all music associated with worship" and detailed a number of duties relating to the selection and presentation of liturgical music.

Id. at *6 (citations omitted).

The Fourth Circuit concluded that the Director of Music "played a prominent role in worship services" and "was the primary human vessel through whom the church chose to spread its message in song." *Id.* at *7-8. As the facts in that case are

strikingly similar to the facts here,[6] there is no conflict between the circuits. To the contrary, two circuit courts of appeal have ruled that directors of music are covered by the First Amendment's ministerial exception. No circuit court has held otherwise.

D. Starkman Cannot Avoid The First Amendment Bar

Trying to convince this Court to take this case, Starkman cites a Ninth Circuit case and argues that it creates a conflict among the circuits. *See Bollard v. The Calif. Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999). That case, however, involved a novice who was allegedly *sexually harassed* while training to become a priest. *Id.* at 944. Comparing that case to the Fifth Circuit's *McClure* case, the Ninth Circuit noted: "[T]his is not a case about the Jesuit order's choice of representative, a decision to which we would simply defer without further inquiry. [The plaintiff] does not complain that the Jesuits refused to ordain him or engaged in any other adverse personnel action." *Id.* at 947. Thus, the Ninth Circuit had no occasion to apply the ministerial exception, so *Bollard* does *not* apply here, and there is *no* conflict between the circuits.

In her Petition, Starkman also reiterates six contentions that the Fifth Circuit already rejected. First, she harps on the facts that she was not ordained and was not a clergy-member in the eyes of the United Methodist Church. (Starkman's Petition at 18-23.) But neither Munholland Church nor Evans have disputed that fact. What Starkman is forgetting here is that the First Amendment prevents her from advancing her claims because the undisputed evidence shows that she was a *spiritual leader*. There is *no* requirement under the law that, in order for the First Amendment

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[6] *See also id.* at *1-2, 7-8.

bar to apply, a plaintiff must have been a clergy-member or an ordained individual. *See, e.g., Roman Catholic Diocese, supra; Bell, supra; Catholic Univ. of Am., supra; Rayburn, supra; Southwestern Baptist Theological Seminary, supra.* Thus, the district court correctly stated -- and the Fifth Circuit agreed -- that "[a]n individual's designation by an organization [*i.e.*, a church] is neither necessary nor sufficient to control the designee's 'extra religious legal status.'" (Starkman's Petition, Appendix C at 19a and Appendix A at 5a-6a.)

Second, Starkman asserts that she "never led the congregation in singing." (Starkman's Petition at 21.) Munholland Church and Evans submit that the district court correctly stated that Starkman, "as the Director of Music, was a very visible presence in leading the congregation during Sunday worship service . . . ." (Starkman's Petition, Appendix C at 21a.) Indeed, Starkman *was* very visible during the Sunday services and other seasonal services (*e.g.*, Christmas and Easter), conducting and directing the choirs -- chancel, youth, children's, and bell. As the choir leads the congregation in singing and as Starkman led the choir, there can be no genuine dispute that Starkman *led* religious ritual and worship on Sundays, especially in light of the evidence showing the importance of music in the Methodist faith. (R-189-99.)

Third, Starkman points out that the United Methodist Church seeks to comply with the ADA. (Starkman's Petition at 12-14.) However, just because a religious body articulates its intention to comply with the ADA does not mean that it is waiving its First Amendment protection in the event that it is sued under that statute by a current or former spiritual leader. While the ADA *generally* applies to religious institutions (*e.g.*, a church secretary or janitor may advance an ADA claim if he or she is discharged because of a disability), the First Amendment bar sometimes is

triggered, as it is in this case. This Brief is replete with cases discussing that bar as it applies to discrimination suits brought by clergy-members and spiritual leaders. Although Starkman cites some cases in her Petition, those cases are *not* persuasive authority in her favor for three reasons. First, some of those cases did not involve churches but, rather, entities which were affiliated with -- but attenuated from -- churches (*e.g.*, schools); thus, the highest level of First Amendment protection was *not* triggered in those cases, as it is here. *See Southwestern Baptist Theological Seminary*, 651 F.2d at 281. Second, some of those cases are distinguished because the plaintiffs in those cases -- unlike Starkman here -- did not participate in religious rituals and did not have numerous religious duties; thus, those plaintiffs were neither clergy-members nor spiritual leaders.[7] Third, some of those cases dealt with contract or pay issues -- matters which involve less interference with a church's affairs than an examination of the reasons for a spiritual leader's discharge.[8]

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[7] *See Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038, 1040 (8th Cir. 1994) (where the plaintiff was a temple administrator who "was responsible for logistical support of activities including supervision of administrative, clerical, building maintenance, and custodial personnel); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1369-70 (9th Cir. 1986) (teachers); *Volk v. Pribonic*, Civ. A. No. 94-2165, 1996 WL 230103 (W.D. Pa. Jan. 16, 1996) (maintenance supervisor); *Davis v. Cottage Hill Baptist Church*, Civ. A. No. 94-0225-RV-C, 1995 WL 795673 (S.D. Ala. Aug. 29, 1995) (janitor).

[8] *See DeArment v. Harvey*, 932 F.2d 721, 721-22 (8th Cir. 1991) (following *Dole*, *infra*); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 & n.13 (4th Cir. 1990) (highlighting the fact that a pay issue was involved and distinguishing the *teachers* at issue from the plaintiffs in the *Rayburn* and *Southwestern Baptist Theological Seminary* cases), *cert. denied*, 498 U.S. 846 (1990). *But see Gargano v. Diocese of Rockville Centre*, 80 F.3d 87, 90 (2nd Cir. 1996) (involving a *faculty-member*).

Fourth, Starkman asserts a public policy argument involving federal tax law. (Starkman's Petition at 23.) This argument -- which she did not raise to the district court until *after* it had granted summary judgment -- was belatedly asserted and should be disregarded. (R-452-54.) Moreover, it is irrelevant because it is not the First Amendment's assignment to coincide with federal tax law.

Fifth, Starkman notes that she failed to verify her answers to the interrogatories at issue (where she listed all of her religious-oriented job duties). (Starkman's Petition at 24.) That failure means nothing, though, as she obviously provided the answers to her attorney -- answers which are replete with religious-oriented duties. She should not prevail now simply because she previously failed to comply with federal rules requiring her answers to be sworn.

Sixth, Starkman contends that her objection to the interrogatories (on the ground of vagueness) saves her. (Starkman's Petition at 25-27.) That contention is futile, however, because the duties that Starkman listed speak for themselves. It does not matter whether she mistakenly categorized some non-religious duties as "religious or worship-oriented job duties." What matters is that her list is laced with duties which she actually performed -- duties which are indicative of a spiritual leader. For example, *Starkman indisputably conducted and directed the choirs during the Sunday Church services, planned worship liturgy, visited sick choir-members, recruited choir-members, hired the Church organist and youth choir leaders, introduced liturgical seasons for worship services, and "carr[ied] out" seasonal obligations such as All Saints' Day, Advent, Christmas, Lent, Holy Week and Easter*. (R-185-87.) All of this undisputed evidence proves that Starkman was a leader -- a *spiritual* leader -- of the Church. There is nothing vague about her answers to the

interrogatories, and there is nothing vague about the interrogatories themselves. Even if she, based on her vagueness objection, were allowed to switch some of her duties from one "column" to the other so as to list more non-religious duties and fewer religious duties, such a maneuver would not operate to diminish her spiritual and leadership role as the former Director of Music. *See Scharon*, 929 F.2d at 362 ("It is without consequence that she also may have performed many secular duties. She was not a secular employee who happened to perform some religious duties; she was a spiritual employee who also performed some secular duties.").[9]

Although Starkman longs for her "day in court," and the granting of summary judgment ostensibly has deprived her of that opportunity, it is submitted that Starkman does not "long" with clean hands. This Court should be aware that the district court gave Starkman several months to present her grievances to an arbitrator, but that she failed to take advantage of that opportunity.[10]

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[9] This Court should not accept Starkman's attempt to change the substance of her answers to the interrogatories by introducing subsequent declarations. (R-95-107.) Faced with similar circumstances, courts have recognized that parties cannot avoid summary judgment by submitting affidavits which contradict their prior sworn deposition testimony. *Bryant v. Western Elec. Co., Inc.*, 572 F.2d 1087, 1088 (5th Cir. 1978); *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 619 (2nd Cir. 1996); *Davidson & Jones Dev. Co. v. Elmore Dev. Co., Inc.*, 921 F.2d 1343, 1352 (6th Cir. 1991); *Clay v. Equifax, Inc.*, 762 F.2d 952, 955 n.3 (11th Cir. 1985).

[10] After the parties had agreed in March, 1998, to non-binding arbitration, Starkman never scheduled a hearing date over the course of *five months*. Starkman has attempted to blame the failure to go to arbitration on Munholland Church and Evans. However, it was Munholland Church and Evans who attempted in May, 1998, to schedule a hearing date. After receiving no response from Starkman, they actually scheduled a hearing, which Starkman then

E. Summation Of Free Exercise Clause Argument

Starkman's contentions have been rejected twice before and should be rejected again. The undisputed evidence shows that she was a spiritual leader of the Church. Therefore, the district and appellate courts properly concluded that the Free Exercise Clause prohibited her from advancing her claims.[11]

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canceled. Later, the parties had some discovery disputes, one of which centered on whether a "911" telephone call from Evans' home years ago had anything at all to do with this litigation. A magistrate judge handled those matters. If this Court chooses to review the record, it will find that Munholland Church and Evans received favorable rulings from the magistrate judge and, therefore, obviously had good reasons for seeking to block or limit discovery in certain irrelevant areas. (R-14, 374-75.)

[11] The Louisiana Constitution also prohibits this type of a suit against a religious entity. *Glass v. First United Pentecostal Church of DeRidder*, 676 So. 2d 724 (La. App. 3rd Cir. 1996) ("The First Amendment of the *United States Constitution* and Article 1, Section 8 of the *Louisiana Constitution* both guarantee religious freedom and have been interpreted to forbid courts from interfering in the ecclesiastical matters of religious groups . . . . This prohibition extends to matters of religious discipline, faith, or custom, *as well as to the appointment and removal of ministers*.") (citing *Joiner v. Weeks*, 383 So. 2d 101 (La. App. 3rd Cir.), *writ denied*, 385 So. 2d 257 (La. 1980)) (other citations omitted) (last emphasis added).

Just as the U.S. and Louisiana Constitutions bar Starkman's claims against Munholland Church, they also bar her claims against Evans. The entire purpose of the Constitutional protections would be defeated if a church were shielded from suits by a former spiritual leader but the church's decision-makers were not similarly protected. The First Amendment does not merely protect the cathedral, chapel, or structure which is the church; instead, it also shields the decision-makers who carry out employment decisions affecting clergy-members or spiritual leaders. Thus, courts have dismissed individual defendants on First Amendment grounds. *See, e.g., Young, supra*; *Scharon, supra*; *Rayburn, supra*; *Glass, supra*; *Joiner*, 383 So. 2d at 106 ("To allow defamation suits to be litigated to the fullest extent against members of a religious board who are merely discharging the duty which has been entrusted to them by their church could have a potentially chilling effect on the performance of those duties . . . .").

II. THE ESTABLISHMENT CLAUSE

Starkman's claims also are barred by the Establishment Clause of the First Amendment.[12] For a statute at issue to withstand scrutiny under this Clause:

> (1) it must have a secular legislative purpose;
>
> (2) its principal or primary effect must be one that neither advances nor inhibits religion; *and*
>
> (3) it must not foster an excessive governmental entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Here, Munholland Church and Evans do not contest the first two parts of the *Lemon* test. Thus, this Constitutional issue turns on the third part: whether the application of the ADA and the Louisiana retaliatory discharge statute to the particular facts of this case results in excessive governmental entanglement with religion. To determine whether any entanglement is excessive, courts examine (i) the character of the institution affected, (ii) the nature of the burden provided, and (iii) the resulting relationship between the church and state. *Id.* at 614-15.

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[12] Munholland Church and Evans made this argument to the district and appellate courts. Although neither of those courts found a violation of the Establishment Clause (Starkman's Petition, Appendix A at 3a n.1 and Appendix C at 16a-18a), Munholland Church and Evans are submitting their arguments on this issue out of an abundance of caution, so that they are not deemed to have waived them.

With regard to the first factor, Munholland Church is an *entirely religious* entity. It is not merely a school or some other organization (*e.g.*, a day-care center) which is affiliated with -- but attenuated from -- a church; instead, it is the Church itself. This fact triggers the First Amendment's highest level of protection. *Southwestern Baptist Theological Seminary*, 651 F.2d at 281.

As for "the nature of the burden provided," the statutes at issue have caused -- and are continuing to cause -- a real and substantial burden on Munholland Church and Evans. Both parties already have engaged in a time-consuming defense of Starkman's claims, including written discovery, depositions, and appeals. This fact alone demonstrates a substantial burden. *Rayburn*, 772 F.2d at 1171.

Finally, concerning the resulting relationship between Munholland Church and the State, the government would be excessively involved in a matter of Church administration if Starkman were to advance this suit. This case is about the employment relationship between a Church and one of its spiritual leaders. If this Court were to review and make findings on the facts of this case, then the state would be trampling the Church's Constitutional right to make its own decisions regarding its employment of religious leaders. *Rayburn*, 772 F.2d at 1169 ("[I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state."). Accordingly, the Establishment Clause prohibits Starkman from advancing her claims. *See Catholic Univ. of Am.*, 83 F.3d at 465-67; *Scharon*, 929 F.2d at 362-63; *Rayburn*, 772 F.2d at 1169-71; *cf. also Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 709 (N.D. Cal. 1995) (ruling that a church's financial decisions -- even though not a part of the church's spiritual function -- are vital to

ministerial and religious planning and, thus, are not subject to court review). *But see Gargano*, 80 F.3d at 90.

CONCLUSION

Starkman's petition for a writ of certiorari should be denied because the undisputed evidence shows that she was a spiritual leader of Munholland Church and the non-conflicting case law provides that the First Amendment bars a court from reviewing the employment relationship between a church and one of its spiritual leaders.

Respectfully submitted, this 14th day of June, 2000.

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Supreme Court, U.S.
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No. 99-1827

IN THE

Supreme Court of the United States

MELANIE STARKMAN,

Petitioner,

v.

THE REV. T. NICHOLS EVANS, a.k.a. NICK EVANS, individually and in his official capacity, etc. and MUNHOLLAND UNITED METHODIST CHURCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF LOUISIANA IN SUPPORT OF PETITION

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MAY IT PLEASE THE COURT:

SUMMARY OF THE POSITION OF THE AMICUS CURIAE, STATE OF LOUISIANA

This amicus curiae brief is being filed in support of plaintiff, a disabled American veteran, because it seems that the so called "ministerial exception" to fundamental civil rights, such as the fundamental rights of plaintiff to petition for redress of valid claims under the Americans With Disabilities Act (ADA), should not be expanded in this case to cover secular, civilian employees of churches, such as a choir director who is not seeking to become a minister. After all, why should a secular disabled American veteran be deprived of her civil rights under the ADA, merely because the alleged violators are a minister and a church? Churches are required by federal law to comply with the ADA, and the so called "ministerial exception" should not be expanded beyond the legitimate protection of a church's right to choose its own ministers, the public policy foundation of the exception, which is not an issue here and which does not apply here. A fair reading of this record and of the briefs shows that Ms. Starkman was never a minister, never sought to be a minister, was a purely secular choir director, and does not seek reinstatement from her church employer. Ms. Starkman's employer admitted in their depositions that she was a "secular", i.e., non-ecclesiastical employee, and these deposition excerpts were filed into the record.

Although the briefs show both party defendants admitted in depositions that Ms. Starkman is a "secular," i.e., non-ecclesiastical, employee, the defendants suddenly claimed that she was actually a "spiritual leader," much to her surprise, as expressed by her comprehensive affidavits of

record controverting this fallacy. Accordingly, at minimum, there should simply be a fair trial on the merits of these issues, and not an unfair and unjust dismissal of her ADA claims, upon an improper summary judgment, based upon on an unfairly expanded "ministerial exception". Otherwise, the disabled citizens of Louisiana and of the other States will fail to obtain adequate redress for their grievances, and will need increased State services to compensate them for their injuries at the hands of others, if their claims are unfairly dismissed with no trial at all, much less a fair trial.

As recognized by the Ninth Circuit Court of Appeal, but not the Fifth Circuit Court of Appeal, in the virtually simultaneous case of *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent* (9th Cir. May 5th, 2000), 2000 U.S. App. LEXIS 8866 (construing the so-called "ministerial exception" narrowly and refusing to apply it to an actual minister where no valid public policies were threatened under the facts of the case); the dissent noted as recently as May 5th, 2000 that these issues raised herein are issues of "*exceptional importance*". *Bollard, id.*

SUMMARY OF ARGUMENT

This is indeed a rare case of exceptional importance, as the trial and panel opinion effectively deprive Ms. Starkman of her fundamental civil rights under the important Americans With Disabilities Act, on the sole ground of the First Amendment's so called "ministerial exception" to the civil rights laws, with no valid constitutional public policy justification presented, since Ms. Starkman was not a minister, and does not seek reinstatement of her employment

at the church. Why should the Fifth Circuit continuously expand the "ministerial exception," thus cutting back on the rights of the disabled and of other injured citizens, when Circuits such as the Ninth Circuit are cutting back on the "ministerial exception"? Disabled persons with unredressed injuries may become burdensome on the States, through increased use of scarce State medical and social resources. Why should violators of the ADA be protected by this Court, and be allowed to discriminate against and abuse the disabled with impunity, when there is no legitimate public policy protecting churches being threatened, and when there is no legitimate public policy served in allowing abuse of the disabled to go unpunished?? Why should an *actual* civil rights violation be allowed to go unremedied, on the grounds of protecting against an *imaginary* Religion Clauses violation? The right of a church to choose its own ministers is not threatened by this important ADA proceeding, which should clearly take precedence. The proper contours of this "exception" to fundamental civil rights laws demand clarification by the Supreme Court of the United States, where millions of secular church workers are affected and where the Circuit Courts are clearly moving in opposite directions on the issue. The very large number of these reported cases alone shows that there is a significant burden of unredressed grievances being placed upon the States through improper pretrial dismissals.

The necessity for a compelling constitutional reason to permit an exception to the civil rights laws on the grounds of the so called "ministerial exception", was recently recognized by *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5th, 2000), 2000

U.S. App. LEXIS 8866, handed down after oral argument in this case, which refused to apply the ministerial exception to an actual minister who had left the order in a sexual harassment case. Otherwise, the Court would again be blindly choosing to fail to remedy an actual constitutional violation, supposedly in order to protect the imaginary, non-existent constitutional violation.

In the dissenting opinion to the order denying rehearing and rehearing en banc in *Bollard v. The California Province of the Society of Jesus, etc.*, 1999 U.S. App. LEXIS 30767, 196 F.3d 940 (9th Cir. December 1, 1999), *rehearing and rehearing en banc denied with dissent*, (9th Cir. May 5th, 2000), 2000 U.S. App. LEXIS 8866, the dissent recognized that these issues raised herein are issues of "exceptional importance," *Bollard, id.*, thus warranting Supreme Court review.

As a general rule, the ADA, by its very terms, applies to religious institutions. Under 42 U.S.C. § 12113(c), the character of defenses available to religious entities is severely curtailed. The general rule is that religious entities must conform to the ADA, although a logical available defense is that a religious entity may discriminate on the basis of religion, i.e., their employees adhering to their "religious tenets," 42 U.S.C. § 12113(c)(2).

Indeed, the relatively recent federal regulations governing compliance by religious entities with the ADA broadly mandate compliance by religious entities with all aspects of the ADA. *See* 29 C.F.R. Part 1630.16(a), which, while permitting to religious entities the requirement of particular religious affiliations, go on to state that:

> However, a religious entity may not discriminate against a qualified individual, who satisfies the permitted religious criteria, because of his or her disability.

29 C.F.R. § 1630.16(a).

By including the defenses available to religious entities described by 42 U.S.C. § 12113(c) and 29 C.F.R. § 1630.16(a), Congress sought to eliminate "entanglement" problems described in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). However, the outright noncompliance with the ADA sought by the Rev. Evans and the Munholland United Methodist Church led by him on the grounds of "burden" or "expense," was *never an option offered by Congress in its passage of the ADA.* The brief reveals that the defendant's insurance company, and not the defendants, paid for the extensive defense of this complaint.

The jurisprudence developing under the ADA and other civil rights statutes has not hesitated to apply these civil rights statutes to churches. In *Gargano v. Diocese of Rockville Centre*, 80 F.3d 87 (2nd Cir. 1996), the Second Circuit found that the Establishment Clause was no bar to an employee's suit against a religious school alleging violations of the Age Discrimination in Employment Act (ADEA). The court noted that religious groups are generally not immune from all governmental regulation of their employment relationships, or from court enforcement of those laws. Similarly, in *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994), an ADEA claim by a former administrator of a religious institution was held to not pose a significant risk of infringement on the First Amendment, and therefore the

religious institution was not immune from the ADEA claim. This case is similar to *Weissman*. *See also Russell v. Belmont College*, 554 F. Supp. 667 (M.D. Tenn. 1982). *Amos v Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints*, 594 F. Supp. 791 (Cen. Dist. Utah 1984) and *Catholic High School Association of the Archdiocese of New York v. Culvert*, 753 F.2d 1161 (2nd Cir. 1985).

In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the Fourth Circuit held that the Fair Labor Standards Act applied to church-operated schools and employees, and did not violate any First or Fifth Amendment rights of the church or its teachers or employees. In *Equal Employment Opportunity Commission v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), the Ninth Circuit concluded that the exemptions from Title VII and the Equal Pay Act did not prohibit the application of those statutes to a religious school. No Free Exercise or Establishment Clause violations were found, allowing the court to prohibit a discriminatory health insurance practice engaged in by the religious school. In *DeArment v. Harvey*, 932 F.2d 721 (8th Cir. 1991), the court found that the First Amendment did not prohibit application of the Fair Labor Standards Act to a church school.

Several District Court decisions have recognized that the ADA applies to religious institutions generally, and have not dismissed employee suits on First Amendment grounds. *See Volk v. Pribonic*, 1996 WL 230103 (W.D. Pa. 1996), or *Davis v. Cottage Hill Baptist Church*, 1995 WL 795673 (S.D. Ala. 1995).

The case primarily relied upon by defendants, *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164 (4th Cir. 1985), is highly distinguishable. In *Rayburn,* the plaintiff was applying for the job of associate pastor. An associate pastor is obviously covered by the "ministerial exception." This Court cannot constitutionally instruct a church concerning who it should and who it should not make into a minister. This is a fundamental constitutional bar, prohibiting the state's intrusion into ecclesiastical matters. Plaintiff cannot and does not dispute this fundamental public policy principle underlying the "ministerial exception." However, the plaintiff in *Rayburn* was an associate pastor, not a lay employee like plaintiff.

The record shows clearly that the plaintiff actually was never authorized to perform any ceremonies of the Church under *Southwestern*, and did not qualify to perform any ceremonies or sacraments. In *General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, County of San Diego,* 439 U.S. 1355, 1369, 99 S. Ct. 35, 58 L. Ed. 2d 63, 77 (1978), and in rejecting the claims raised by the United Methodist Church in that case, the Supreme Court of the United States made clear that the courts could constitutionally conduct their own inquiry into the structure and operation of a church consistent with the First Amendment. In so doing, the court may examine pertinent information generated by the church, such as the Methodist Book of Discipline. As that publication and her Declaration make clear, Ms. Starkman was never authorized to perform ceremonies or administer sacraments.

CONCLUSION

The decision should be reversed, because the federal court system should unhesitatingly seek to protect the rights of the disabled from discrimination. Here, the church's right to choose its own ministers is not being questioned or threatened, and reinstatement is not being sought. This right of the church to choose its own ministers is the proper place for the "ministerial exception," not some unwarranted and unnecessary extension of the "ministerial exception" into non-ecclesiastical, secular areas in which it does not and should not apply. This exception to fundamental civil rights laws certainly should not be abused, stretched, and expanded to impermissibly protect illegal discriminatory conduct towards the disabled, as recognized by the Ninth Circuit in *Bollard*. Otherwise, a substantial burden upon the State will be created by unredressed grievances, and increased medical and social costs, due to improper pretrial dismissals. Furthermore, the decision should be reversed, to assure that litigants in the federal judiciary receive fair trials, and do not have their valid and substantial claims dismissed on unwarranted grants of summary judgment, where they have, as here, submitted ample controverting evidence, clearly demonstrating the existence of genuine, and *bona fide,* material issues of fact in dispute, warranting a simple fair trial on the merits of the dispute. As our more vulnerable citizens, the disabled persons of this country especially deserve judicial protections.

Respectfully submitted,

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